American Bar Association Journal

JULY 1956 • *Volume 42* • *Number 7*

Real estate titles are not posted like roads. But the HAZARDS are there.

HAZARDS that can

Delay construction

Encumber the security behind mortgages

Hold up sales

Reduce the saleability of mortgages

Cause financial loss

Title insurance is the best protection against loss because of title hazards.

Thousands of title specialists in the Lawyers Title network of Branch Offices, Agents and Approved Attorneys are experts in handling all title insurance requirements quickly and courteously. And, remember . . . . . .

THERE IS NO BETTER TITLE INSURANCE THAN A POLICY ISSUED BY

Lawyers Title Insurance Corporation

Home Office ~ Richmond, Virginia

TITLES INSURED THROUGHOUT 43 STATES THE DISTRICT OF COLUMBIA, PUERTO RICO AND HAWAII

NATIONAL TITLE DIVISION OFFICES

Chicago New York

BRANCH OFFICES IN:

Akron, O.	Detroit, Mich.	Norfolk, Va.
Atlanta, Ga.	Flint, Mich.	Pittsburgh, Pa.
Augusta, Ga.	Freehold, N. J.	Pontiac, Mich.
Birmingham, Ala.	Grand Rapids, Mich.	Richmond, Va.
Camden, N. J.	Macon, Ga.	Roanoke, Va.
Cincinnati, O.	Marietta, Ga.	Savannah, Ga.
Cleveland, O.	Miami, Fla.	Springfield, Ill.
Columbus, Ga.	Mount Clemens, Mich.	Washington, D. C.
Columbus, O.	Newark, N. J.	White Plains, N.Y.
Dallas, Tex.	New Orleans, La.	Wilmington, Del.
Dayton, O.	Newport News, Va.	Winston-Salem, N. C.
Decatur, Ga.	New York, N. Y.	Winter Haven, Fla.

REPRESENTED BY LOCAL TITLE COMPANIES IN MORE THAN 200 OTHER CITIES

THOUSANDS OF APPROVED ATTORNEYS LOCATED THROUGHOUT THE OPERATING TERRITORY

July, 1956

This Month's Cover

The name of Solon (638?-559? B.C.) has come down in history as the great lawgiver of Athens, one of the great statesmen of history. Many of the details of Solon's reform of the Athenian law have been lost, but he is generally credited with inventing a constitution that laid the foundations of the Athenian democracy which reached its zenith under Pericles. One of the most noteworthy features of Solon's constitution was the Heliaea, the courts of justice, and the institution of a jury appointed by lot from all the citizens. The drawing is by Charles W. Moser, of Chicago.

The AMERICAN BAR ASSOCIATION JOURNAL is published monthly by the AMERICAN BAR ASSOCIATION at 1155 East 60th Street, Chicago 37, Illinois.
Entered as second class matter August 25, 1920, at the Post Office at Chicago, Illinois, under the act of August 24, 1912.
Price per copy, 75¢, to Members, 50¢; per year, $5.00; to Members, $2.50; to Students in Law Schools, $3.00;
to Members of the American Law Student Association, $1.50.
Vol. 42, No. 7. A change of address must reach the JOURNAL office five weeks in advance of its effective date. Be sure to give both old and new addresses.

The President's Page

E. Smythe Gambrell

■ June 1 finds me in lovely and gracious Spokane, attending our unforgettable Pacific-Northwest Regional Meeting for the lawyers of Alaska, Idaho, Montana, Oregon, Utah and Washington and our guests from Alberta and British Columbia. I am to leave for Mexico immediately after the banquet tonight, which means this must be written hurriedly in a penthouse on the Davenport Hotel overlooking the gorgeous Cascades of the Spokane River and the entrancing Washington and Idaho landscape beyond. The institutes and seminars are in full blast in the public rooms on the mezzanine floor and echoes of male and female voices in the halls and lobby attest to the good fellowship here. In such an atmosphere it is not easy to hide and write about things that already have happened elsewhere. But chronicling the stories of this year's activities of the Association is never burdensome or prosaic.

We have come to realize that no lawyer can live in isolation. We know that without co-operative enterprise the practitioner lacks an essential ingredient of professional stature and that only in joint endeavor with his fellows can he achieve the full scope of his professional function. The active members of the nation's fifteen hundred bar associations comprise the aristocracy of the Bar—an aristocracy whose selection is based upon service and achievement in keeping with the great traditions of our profession.

Theodore Roosevelt said: "Every man owes some of his time to the upbuilding of the profession to which he belongs." Lord Bacon in similar vein had observed: "I hold every man a debtor to his profession; to the extent that it has honored him, he should be prepared to give to it something of himself."

As I travel through the states and territories speaking to bar groups several times each week, the prompt responses to our call for unified action testify eloquently to the common interests and ideals which now animate the profession. Our current mobilization of the human and financial resources of our profession gives added strength to do the work —to supply the leadership—which the public has a right to expect of us. The Association has traveled far in its deliberate progress from a semi-social beginning in 1878 to this happy hour when, housed in the new American Bar Center, we can boast of adding as many new members in twenty days this year as had been added in the previous twenty years. We hold in grateful and respected memory our Founder, Judge Simeon E. Baldwin, and such past Presidents as William Howard Taft, Elihu Root, John W. Davis, Charles E. Hughes, and the other giants who have been our leaders in earlier days. How titanic was their labor; how different might this Association have been today if a single one of the stones these men laid had been omitted from our structure. They had the vision; they first pointed out opportunity and duty and headed us in the direction of our current era of broader and richer service. And written in glory with their names we now have the names of the many whose recent exertions in our great mobilization campaign have gained for us the right to speak and act for the profession as a whole.

We, the lawyers of America, represented in the American Bar Association, have come to full and responsible leadership of the legal profession. The task is fittingly ours. No other group of men and women has a right to claim this honor. Many men and women of worth and character in other vocations have served alongside those of our calling in the legislative halls and executive chambers and elsewhere; but the due administration of justice, the maintenance of the courts, the leadership in the making, interpretation and application of law —these are the lawyer's peculiar contribution to the safety and endurance of government. This Association and the work that is being carried on within it are consecrated to the welfare of every American citizen. But we as lawyers are entitled to say with no undue boasting that the American Bar Association is the hearthstone, the workshop, the temple, of the legal profession in this country.

The profession endures, and this Association is the expression of our abiding dedication. This Association bespeaks the common cause, the unifying principle of the profes-

sion. Few of those in positions of leadership in it today will long enjoy such eminence. Their successors, who in relatively brief periods of service will share its honors and its responsibilities, will come and go. We all are but the passing instruments of a process which outlives our fleeting hour.

As was said here recently, amassing men and money is not our goal. The ends we seek are substantial accomplishments for ourselves and the public. What can we do to help lawyers better their own position and better serve the public?

I have cherished the hope that with our increasing strength we could establish this year a separate news publication for circulation to our entire membership—this in addition to the well-edited JOURNAL, which all members now receive. It is gratifying that the *American Bar News* is now a reality and that you will receive the first issue in July. If our joint endeavors are to count for anything, we must keep our members well informed on what we are doing for the profession and how they may share in our work and the fruits of our labors. That is the function of the new publication, which will be edited by Don Hyndman, Director of Public Relations, and be published by the JOURNAL, whose Editor-in-Chief, Tappan Gregory, is giving it his wholehearted support.

I am hoping that before the close of the current administration we may go even farther and provide for every member of the Association still another much-needed publication—a pocket-size magazine, published bimonthly, carrying timely "down-to-earth" articles on practical "bread-and-butter" subjects designed to help lawyers keep up with the rapid developments in all fields of practice and do better work for their clients.

I have been insisting that membership in local, state and national bar organizations is essential to the success of every lawyer. To be consistent, we must make clear that membership in the American Bar Association is worth while—that it benefits the lawyer—that it serves as a vehicle through which he may give expression to his instincts for public service within the profession. One of the best ways to make good on this is to give every member a lively professional news bulletin and a practice magazine, in addition to the JOURNAL. It is gratifying to know that Editor Gregory is not only giving his support to these new projects, but is going farther and expanding and improving the JOURNAL, particularly with reference to "bar activities".

Another project which ought soon to be undertaken is research into the past, present and future of the legal profession. We should find out why 75 per cent of the people who need legal services never go to a lawyer; why the trend is toward boards, commissions, bureaus, and arbitration, and away from courts of law and lawyers; why lay encroachments on the domain of the legal profession are increasing. If lawyers and courts of law need constant improvement to keep up with changing conditions, we want to know about it so that we may make the needed improvements. We must be constantly on the alert to measure up to what is expected of us or be lost in the never ending rivalry for public favor. We must enlarge and intensify our public relations program which starts with "being good". Unless in character, competency, availability and responsiveness we merit public approval, all the whitewash we might apply to ourselves and the administration of justice could help us little.

There is no doubt that we frequently come in for undeserved criticism by the press, radio, television and theater and that we owe it to ourselves to eliminate such criticism at its sources. Helpful in this endeavor would be the writing and releasing of constructive news items and articles dealing with our profession and its service to the public, and the production of television shorts for general release under proper financial sponsorship. The Board of Governors and our Committee on Public Relations are giving their attention to these matters, and tangible results no doubt will be reported at an early date.

Another matter of great importance is the filling of the vacancy in the Office of Executive Director of the Association. Our able and beloved Joseph D. Stecher has been willing to serve in that capacity on a part-time basis in the past year, and it is my fond hope that we may soon announce that he has consented to make a career of this all-important work as chief of staff at the Bar Center. Nothing could be a greater boon to the profession than this development.

I have said repeatedly that "The privilege of belonging to the American Bar Association is open to every American lawyer in good standing." In the conduct of the recent membership campaign we made good on that statement. At the beginning of this administration, we streamlined the membership application blank. Last week it was further revised to emphasize our membership policy which no one now can fail to understand.

The hope of the legal profession in this country, like the hope of most great organizations and institutions, rests largely with the younger generation. We expect to continue, as a normal part of our activity, our exertions to bring within the membership of the Association all lawyers in good standing, but we know that the chief source of new memberships will be the graduates who come each year from the law schools. In recent years we have heard the suggestion that law students be given membership status. The problem has been how to enroll students, who are non-lawyers, and avoid the confusion that might result, particularly in relation to students who do not graduate or become members of the Bar. I believe that some of us who have had our

(*Continued on page 678*)

American Bar Association Journal

the official organ of the

AMERICAN BAR ASSOCIATION

published monthly

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law, International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except that for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the Junior Bar Conference. Dues for the other Sections are as follows: Administrative Law, $5.00; Antitrust Law, $5.00; Bar Activities, $2.00; Corporation, Banking and Business Law, $5.00; Criminal Law, $2.00; Insurance Law, $5.00; International and Comparative Law, $5.00; Judicial Administration, $3.00; Labor Relations Law, $6.00; Mineral Law, $5.00; Municipal Law, $3.00; Patent, Trade-Mark and Copyright Law, $5.00; Public Utility Law, $3.00; Real Property, Probate and Trust Law, $3.00; Taxation, $6.00.

Blank forms of proposal for membership may be obtained from the Association offices at 1155 East 60th Street, Chicago 37, Illinois.

American Bar Association

HEADQUARTERS OFFICE, 1155 EAST 60th STREET, CHICAGO 37, ILLINOIS
WASHINGTON OFFICE, 1025 CONNECTICUT AVENUE, N. W., WASHINGTON 6, D.C.

Officers and Board of Governors 1955-56

President E. SMYTHE GAMBRELL, C. & S. National Bank Building, Atlanta 3, Georgia
Chairman, House of Delegates, JOHN D. RANDALL, American Building, Cedar Rapids, Iowa
Secretary JOSEPH D. STECHER, Toledo Trust Building, Toledo 4, Ohio
Treasurer HAROLD H. BREDELL, Consolidated Building, Indianapolis 4, Indiana
Assistant Secretary JOSEPH D. CALHOUN, 218 West Front Street, Media, Pennsylvania

Ex Officio
- The President,
- The Chairman of the House of Delegates,
- The Secretary,
- The Treasurer,
- LOYD WRIGHT, Last Retiring President, 111 West Seventh Street, Los Angeles 14, California
- TAPPAN GREGORY, Editor-in-Chief, *American Bar Association Journal,* 105 South LaSalle Street, Chicago 3, Illinois

First Circuit	ELWOOD H. HETTRICK, 11 Ashburton Place, Boston 8, Massachusetts	*Sixth Circuit*	BLAKEY HELM, M. E. Taylor Building, Louisville 2, Kentucky
Second Circuit	OSMER C. FITTS, 16 High Street, Brattleboro, Vermont	*Seventh Circuit*	RICHARD P. TINKHAM, Calumet Building, Hammond, Indiana
Third Circuit	VINCENT P. McDEVITT, 1000 Chestnut Street, Philadelphia 5, Pennsylvania	*Eighth Circuit*	HERBERT G. NILLES, Black Building, Fargo, North Dakota
*Fourth Circuit**	ROBERT T. BARTON, JR., Mutual Building, Richmond 19, Virginia	*Ninth Circuit*	JOHN SHAW FIELD, 15 West Second Street, Box 1291, Reno, Nevada
Fifth Circuit	JOHN C. SATTERFIELD, Box 1172, Jackson, Mississippi	*Tenth Circuit*	THOMAS M. BURGESS, Mining Exchange Building, Colorado Springs, Colorado

**The District of Columbia Circuit is considered a part of the Fourth Circuit for the purposes of the Board of Governors.*

Board of Editors, American Bar Association Journal, listed on page 648

Advisory Board of the Journal

REX G. BAKER	Houston, Texas
CUTHBERT S. BALDWIN	New Orleans, Louisiana
PHILIP R. BANGS	Grand Forks, North Dakota
WALTER M. BASTIAN	Washington, D. C.
E. DIXIE BEGGS	Pensacola, Florida
STEPHEN W. BOWEN	Tucumcari, New Mexico
GEORGE E. BRAND	Detroit, Michigan
JAMES E. BRENNER	Palo Alto, California
ROY A. BRONSON	San Francisco, California
THOMAS M. BURGESS	Colorado Springs, Colorado
CLAUDE E. CHALFANT	Hutchinson, Kansas
WALTER CHANDLER	Memphis, Tennessee
HOWARD COCKRILL	Little Rock, Arkansas
CYRIL COLEMAN	Hartford, Connecticut
WALTER E. CRAIG	Phoenix, Arizona
LELAND M. CUMMINGS	Salt Lake City, Utah
JOSEPH J. DANIELS	Indianapolis, Indiana
MARTIN J. DINKELSPIEL	San Francisco, California
JAMES M. DOUGLAS	St. Louis, Missouri
FRANCES CRAIGHEAD DWYER	Atlanta, Georgia
JAMES D. FELLERS	Oklahoma City, Oklahoma
DONALD A. FINKBEINER	Toledo, Ohio
OSMER C. FITTS	Brattleboro, Vermont
WILLIAM W. EVANS	Paterson, New Jersey
JOHN SHAW FIELD	Reno, Nevada
P. WARREN GREEN	Wilmington, Delaware
JOSEPH W. HENDERSON	Philadelphia, Pennsylvania
ALLAN H. W. HIGGINS	Boston, Massachusetts
FRANK L. HINCKLEY	Providence, Rhode Island
MANLEY O. HUDSON	Cambridge, Massachusetts
WILLIAM J. JAMESON	Billings, Montana
NICHOLAS JAUREGUY	Portland, Oregon
HUBERT S. LIPSCOMB	Jackson, Mississippi
L. DUNCAN LLOYD	Chicago, Illinois
SHACKELFORD MILLER, JR.	Louisville, Kentucky
MORRIS B. MITCHELL	Minneapolis, Minnesota
B. ALLSTON MOORE	Charleston, South Carolina
R. DEAN MOORHEAD	Austin, Texas
EDWARD E. MURANE	Casper, Wyoming
FRANK B. OBER	Baltimore, Maryland
EDWIN M. OTTERBOURG	New York, New York
FRANKLIN E. PARKER, JR.	New York, New York
JOHN J. PARKER	Charlotte, North Carolina
HAROLD L. REEVE	Chicago, Illinois
WARREN H. RESH	Madison, Wisconsin
FREDERICK D. G. RIBBLE	Charlottesville, Virginia
WILLIAM F. RILEY	Des Moines, Iowa
CLEMENT F. ROBINSON	Brunswick, Maine
WILLIAM ALFRED ROSE	Birmingham, Alabama
WHITNEY NORTH SEYMOUR	New York, New York
E. B. SMITH	Boise, Idaho
REGINALD HEBER SMITH	Boston, Massachusetts
ROBERT G. STOREY	Dallas, Texas
THOMAS TODD	Seattle, Washington
ROBERT W. UPTON	Concord, New Hampshire
JOHN J. WILSON	Lincoln, Nebraska
CHARLES C. WISE, JR.	Charleston, West Virginia
MELVIN T. WOODS	Sioux Falls, South Dakota
LOYD WRIGHT	Los Angeles, California

Views of Our Readers

▪ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.

He Finds the Journal "Lengthy and Heavy"

▪ Time after time, as I have read through the lengthy and heavy AMERICAN BAR JOURNAL [*sic*], I have wondered why it is that we are belabored by lengthy articles on such questions as "School Segregation", "Model Penal Code", "McCarthy", "Relief for War Victims" and "Printer to Their Majesties"—the last being an article concerning 1792, and again so frequently some article on Lord Northumberly or Coke and his influence on bailments. I only wish I could remember more of the titles of the articles that have appeared from time to time in our JOURNAL.

Have any of you ever seen the *Journal of the American Medical Association,* or have any of you ever seen the journal of any state medical association? Have you ever looked at the magazine of the insurance counsel? Now there are three magazines that contain a world of information on just what is going on in their respective fields.

I have had this urge to write to you for years. Recently, I was on the local group that tried to get more members in the American Bar Association, and the one predominate criticism that we all received was—why should I take that Journal of The American Bar Association that contains nothing of any value to me in my everyday work.

That is a good criticism and one to which we should give some attention.

Now I get a piece of literature from some organization down in Philadelphia called the Committee on Continuing Legal Education which says it collaborates with the American Bar Association.

The first question is why should we need to buy two magazines?

The next question is why cannot the AMERICAN BAR JOURNAL cover the subjects that this Philadelphia group insists that they have in their magazine?

Can we not get out a JOURNAL that contains more pertinent, down-to-earth information on various cases and subjects that affect the everyday lawyer in his everyday work. The doctors are very proud of their JOURNAL put out by their national association, they keep it constantly in their office and by reference to their magazine can find articles pertinent to matters that they are handling and which gives them something new and something directly in point.

I dislike to write this letter primarily because I feel that our organization is of such tremendous size, with more committees, bureaus and departments than the Federal Government, but nevertheless, I shall send it to you, hoping that somewhere, somehow in some way it may reach someone who will consider the voice of the country lawyer who desires to be of some help to his tremendous national organization.

Let us make our JOURNAL something which every lawyer looks forward to reading because in it will be information, if not pertinent immediately, will be of some advantage and help in the days to come.

Pardon this idea of suggestion which probably will not be well received, but we send it on just the same.

WILLIAM G. PICKREL

Dayton, Ohio

[*Editor's Note:* By coincidence, Mr. Pickrel's letter arrived within a fortnight of the letter from Mr. Mullen, which is printed below. Mr. Pickrel may also be interested in the editorial on page 648 of this issue, which sets forth the considerations that guide the Board of Editors in determining the content of the JOURNAL.]

Mohammed Should Come to the Mountain

▪ Mr. Buhl in the March issue of the JOURNAL, after referring to the social security question, says that "it would appear that the Association has lost touch with the average lawyer practicing today". To whatever extent that may be true, the average practicing lawyer is himself, I believe, largely responsible.

For reasons that at the time seemed, and to many still seem, persuasive, the Association did oppose social security coverage for lawyers.

Using the rights accorded every member of the Association, on the floor of the Assembly at the Annual Meeting in Boston on August 27, 1953, I moved for reversal of the Association's position. (78 *A.B.A. Reports* 112, 113). A related resolution was presented by Joseph Harrison, of New Jersey. It is no credit to the "average lawyer practicing today" that on that occasion we stood virtually alone. Little wonder when three quarters of the Bar do not even belong to the Association and only a small fraction take an active interest in its affairs.

Pursuant to the recommendation of the Resolutions Committee resulting from the presentation of our motions, the JOURNAL published extensive articles on both sides of the controversy and a survey of the sentiment of the Bar was taken. In ef-

fect, the Association got in touch with those lawyers who were not in touch with it. The project doubtless would have taken less time if a greater proportion of the Bar belonged to the Association.

Acting on the results of the survey, the House of Delegates did at its mid-winter meeting last February reverse its earlier stand on social security coverage.

Not to labor the obvious, if Mr. Harrison and I had not been members of and taken part in the activities of the Association, we should have had little basis for complaint if the Association had, in fact, "lost touch" with us.

JOHN M. MULLEN
Boston, Massachusetts

Some Reverse English—God Save Our Language!

■ You have surely heard of the Senator who opposed *inflation*, and stood firmly on a platform of *flation*. Or the autoist who drove fifteen feet behind the truck marked "flammable," mumbling, "Sure glad they got those '*in*flammable' wagons off the road."

The same school of thought has now produced a judicial doctrine that if a lien isn't "inchoate," it must be "choate". This appears in a recent Oregon decision (295 P. 2d 162 at 166) which takes its cue from a United States Supreme Court opinion of 1953 (347 U.S. 81 at 86). My earliest observation of this heresy is in 329 U.S. 362 at 371 (1946), where the late Mr. Justice Rutledge remarked (I always supposed with his tongue in his cheek) that the petitioner claimed the lien was not "choate". Webster's 1948 edition recognizes "choate" as a "rare" antonym for "inchoate"; his 1932 edition did not recognize it at all.

This is undoubtedly a great discovery in word-coining, and we can't help wondering how lawyers, who have used "inchoate" for centuries to describe a wife's prospect of dower, overlooked this simple method of fabricating an antonym. Poor devils, they were forced to use circumlocutions like "consummate", when referring to dower, or "perfected", when referring to liens. Imprisoned in their chains of classical education, they did not know that any word could be turned into its opposite by dropping an "in". They realized, no doubt, that "inchoate" comes from two words meaning "take" and "on". Something "taken on" was something begun, but not finished. And you couldn't finish it just by dropping the "on".

"Choate" is a flag of the new freedom from etymology. The possibilities are endless. Where we now have, in antitrust law, the doctrine of "incipiency", we will counter with the doctrine of "cipiency". To fight off the increasing cost of justice, we will form the association for "creasing" the cost of justice. The movement will spread to other prefixes too, under the slogan "drop a prefix, and create an opposite". When the Chief Justice drops in to say, "Are

(Continued on page 610)

(Continued from page 608)

you beginning that opinion," the Associate will answer, "I began long ago; I'm just about to gin."

ALFRED F. CONARD

University of Michigan Law School
Ann Arbor, Michigan

Legal Specialties— One Answer to Mr. DeChimay

■ Mr. DeChimay's letter in the March, 1956, JOURNAL asks why the American Bar Association does not set up "boards", as does the medical profession, for the classification of specialists.

The answer, dear Mr. DeChimay, is simply that the American Bar Association is still dominated by those who are, in turn, dominated by self-interest. Probably all lawyers recognize that the *public* would be better served by consulting a tax lawyer for a tax problem, or a trial lawyer (rather than a probate specialist) in a personal injury case.

Nevertheless, to this date the interests of the public have been held subservient to the interests of the general practitioner who fears he may lose a client, somewhere along the line. While it is malpractice for a gynecologist to attempt brain surgery, a legal jack of all trades is at liberty to try his hand at any branch of the law foreign to his experience. And all too few possess the wisdom and unselfishness to call in those with more concentrated training in a special phase of the law to assist them.

We who agree with you have rammed our heads against the stone wall of the Association upon more than one occasion. Keep trying. Enough voices in the wilderness may help to produce the desired result.

JOHN ALAN APPLEMAN

Urbana, Illinois

[*Editor's Note:* By way of response to the inquiry of Mr. Joseph DeChimay (42 A.B.A.J. 214, March, 1956), we point out that the Association has had the matter of regulation of voluntary specialization under consideration since 1952. In 1954, the Board of Governors and the House of Delegates approved the principle that it was deemed necessary to regulate voluntary specialization in the various fields; that in order to entitle a lawyer to recognition as a specialist in a particular field, he should meet certain standards of experience and education; and that the implementation of the plan be left to the Board of Governors, subject to final approval of the House of Delegates. A special committee of members of the Board prepared a detailed plan of regulation which involved setting up a permanent organization to be known as "The Council of Legal Specialists", which would, with the approval of the House of Delegates, establish specialty fields in the practice of law and entertain petitions by various persons desiring to organize spe-

(Continued on page 611)

(*Continued from page 610*)

cialty groups for recognition in these fields. The plan also provided a means for the establishment and approval of certain standards of proficiency for each group and a method of continuous supervision.

[Because of complaints that members of the Association had not been given an opportunity to be heard, a hearing was scheduled before the Board of Governors at Chicago on October 14, 1954. Notices of the hearing were sent to all specialty groups, whether affiliated with the American Bar Association or not, and all other persons who were thought to have an interest. Among those appearing were persons representing the following potential specialty groups: admiralty and maritime law, patent law, trademark and copyright law, administrative law, tax law, trial law, insurance law and probate law. The representatives in these potential specialty fields were unanimously opposed to the adoption of any plan of regulation. Their arguments were about as follows: They consider themselves general practitioners with some more emphasis on a particular field than the average lawyer; the various Sections of the Association are attempting to remove the mark of specialization from their specific fields by bringing education in these fields to all lawyers; specialization in the medical field has gone too far at the present time, so that in some instances it amounts to craft unionism with jurisdictional squabbles; the system proposed in the plan would be difficult and perhaps impossible to administer fairly. It would likewise be expensive.

[Four persons appeared before the Board of Governors and advocated adoption of the plan. Professor Charles Joiner of the University of Michigan was the spokesman for the group, and his views are contained in his article in 41 A.B.A.J. 1105 (December, 1955). One of the others represented a Committee on Specialization of the New York State Bar Association, and the other two appeared as individuals.

[In view of the overwhelming sentiment against the adoption of any plan, the Board of Governors deferred action.]

Re the Segregation Cases—History Repeats Itself?

■ I have read with interest the brilliant arguments in favor and in opposition to the decision reached by the United States Supreme Court in the well known and highly controversial segregation cases.

It is indeed difficult to accept either argument, as in both instances, the authors' reasoning is sound.

Perhaps one passage in particular from the article by Eugene Cook and William I. Potter expressly states the reason for the results so reached, and I quote from page 313, paragraph numbered 2. "The Court, has, without any implementing act of the Congress such as is required under the terms of the Fourteenth Amendment, and by an order unprecedented in judicial history, assumed the power under that Amendment to enforce commingling of the white and colored races in state-supported schools, thus rendering a nullity state laws providing for separate but equal educational facilities—an anomalous assumption of power that constitutes further encroachment by the central Government upon the rights reserved to the states and to the people by the Federal Constitution."

The issue of states rights versus federal rights isn't new. Such an issue existed at the time of the great Thomas Jefferson, the champion of states' rights, and his opponent, Alexander Hamilton, who championed the superior rights of the Federal Government. No doubt, history has continually been repeating itself, and the segregation cases only examplify one of the many instances in which such an issue was involved.

MARIE F. PETROCELLI
Brooklyn, New York

Backlogs:

Justice Denied

by **Harry D. Nims** · *of the New York Bar (New York City)*

▪ Every lawyer knows the expression "Justice delayed is justice denied". Most lawyers are aware of the tremendous backlog of cases which has been built up in many of our courts, especially in metropolitan areas. Mr. Nims takes the profession to task for the situation, declaring that the Bar as a whole has been indifferent or worse to the problem. The politician's favorite answer, create more judges, is inadequate, he says, while the Bar has failed to make use of all the devices that have been developed for reducing backlogs.

> If we begin with certainties, we shall end in doubts; but if we begin with doubts, and are patient in them, we shall end in certainties.
>
> —Bacon

▪ The failure of the courts to deal promptly with backlogs involves very human consequences. Controversies are prolonged; hard feelings emphasized; families suffer privation from their inability to obtain relief; children are prevented from continuing in school; widows and wives are forced to work for years to provide for their children while awaiting a decision in cases growing out of the death of or injury to their husbands, and in the end they may pay 50 per cent of their awards to lawyers. As a result, people seeking relief become embittered and hate the courts and the law because the legal profession has not lived up to its responsibilities in a field where its responsibilities are primary and almost exclusive.

Traditionally, the courts have operated on the theory that the only way they can dispose of pending cases is to try them; and so, until recently, they have devoted practically all their efforts and their facilities, both material and personal, to trials, believing that there was nothing else they could do.

Trial is a slow process. It takes two to three court days to try a jury case. Some take much longer. This means that on the average, a judge will try only two or three jury cases a week; and since there has been and still is little elasticity in court methods or organizations, waiting cases often pile up. Hence, the backlogs.

Pre-trial came into use about 1929. It soon taught us that friendly discussions by counsel with a judge can be a most effective and practical way of ending cases quickly without inflicting on litigants the expense, delay and worry of a trial.

Until very recently, however, judges who used pre-trial held their conferences a few days or weeks before the trial. As a result litigants who were quite willing to settle their case at any time with the aid of a judge have had to wait months and sometimes years before they received the help from the court which they needed and to which they were entitled.

Some years ago the English courts authorized conferences, but their use was optional. This process was known as "Summons for Directions". It covered a hearing soon after the case was begun, in which the judge or master dealt with preliminary matters. Its purpose was to reduce expense and delay in using the courts. In October, 1954, its use was made mandatory in all cases; and now all plaintiffs are required, within seven days after the answer is filed, to take out a summons which calls a hearing with a judge in which he must deal with all matters preliminary to trial or transfer the case to a lower court. Many settlements result.[1]

Recently, the Circuit Court of Michigan, in Detroit, and the Supreme (superior) Court of New York in New York County (Manhattan) and perhaps courts in other localities began sending all new cases into conferences with a judge almost immediately after the answer is filed. In this way they are disposing of about one third of such new cases almost at once.

It would be difficult to exaggerate

1. *Summons for Directions*, 98 Solic. Law Journal 598, September 1, 1954.

the significance of such new methods. They enable the court, of its own motion, to help litigants to act on the advice of a very wise man of many, many years ago to "agree with thine adversary quickly". They give prompt relief where before litigants waited sometimes years for relief. They demonstrate that courts can, if they will, offer litigants practical methods for obtaining speedy justice.

This new approach is but one of various interesting changes in court methods in recent years. Our population is increasing. In some jurisdictions more people seem to be using the courts. In the United States District Courts the cases between private parties have almost doubled since 1941 and increased fourfold in the past fifty years.[2] Strangely enough, however, of the cases which are disposed of in the superior courts today, in only a very small percentage of them do the parties resort to trial; some courts not over 5 per cent.

In this connection it is of some interest to note the percentages of civil cases disposed of in various state superior courts, which are ended by trial at the present time: Circuit Court, Michigan (Detroit) 5 per cent; Arizona 5 per cent; Connecticut 9 per cent; Illinois 10 per cent; Massachusetts 12 per cent; New Hampshire 15 per cent; New Jersey 13 per cent; New York 8 per cent; Texas 10 per cent and Virginia 26 per cent. At one time, only 3 to 4 per cent of the thousands of civil cases brought in the United States District Courts by the Office of Price Administration were ended by trial.[3]

Judge Frank Fitzgerald of the Circuit Court in Detroit reports that of the 5 per cent of civil cases disposed of by this court by trial, eight out of ten may be characterized as nuisance cases; an indication, he believes, that cases of merit are being recognized as such and are disposed of by agreement before trial is reached.

It is also of interest that these percentages seem to have been steadily declining in recent years.

For instance, of the total cases disposed of by the Massachusetts Superior Court in 1924, 21 per cent were ended by trial. In 1934, 10 per cent were ended by trial. In 1944, the figure was 14 per cent and in 1955 it was 11 per cent. Expressed in other terms, in 1924, out of every ten cases disposed of, two were ended by the trial process, and in 1955, only one.

The Superior Court in Connecticut in 1928 ended by trial 14 per cent of the cases of which it disposed. In 1953 the figure was 9 per cent.

The New York Supreme (superior) Court in 1935-36 ended 24 per cent of its civil cases by use of trials. In 1954-55, 8 per cent were ended in this way. In other words, of every twelve cases this court disposed of in 1935, three were ended by trial; in 1954 of every twelve cases disposed of only one was ended by trial.

In 1941, 14 per cent of the cases disposed of by the United States District Courts were ended by trial. In 1954-5, 9.5 per cent were terminated in this way or expressed differently, in 1941 out of every 100 cases finally disposed of fourteen were ended by trial; in 1954, less than ten.

The Circuit Court of Michigan in 1933 used the trial process to end 21 per cent of its cases. In 1954, it was used in 16 per cent.

These figures do not present an accurate over-all picture but they may suggest changes which have been going on in the courts in recent years.

Far better statistics of the work of the state courts are badly needed. In some states they are almost nonexistent. In most states they are incomplete and not very helpful on many important problems facing the profession. It well may be that here is a field of usefulness which the American Bar Association might well consider.

The Backlog Problem . . . *Solutions Disregarded*

The backlog problem has been studied again and again and by some of the ablest of our judges and lawyers. Solutions have been offered but most of them have been disregarded and forgotten.

In 1927, the Supreme Court in New York City had a very large backlog. In that year it organized a committee of seventeen lawyers and judges to consider it. It was called "The Special Calendar Committee". It had a most distinguished membership. It included Charles E. Hughes, later Chief Justice of the United States Supreme Court, Henry W. Taft, William D. Guthrie and Judges Samuel Seabury and Clarence Shearn. It would be difficult to assemble a group whose opinion would be entitled to greater weight. It rendered three reports, one in 1927, one in 1928 and one in 1930. Its recommendations were ignored.

The problem was investigated again, four years later, by a statewide body created by the legislature: "The Commission on the Administration of Justice in New York State". This also was a capable group. One of its active members was Robert H. Jackson, later a member of the Supreme Court of the United States.

In 1934, it published a report of 1,016 pages (New York Legislative Doc. 1934, No. 50). As a basis for its findings it examined the files of most of the cases then pending in the State Supreme (superior) Court. It adopted and approved the recommendations of "The Special Calendar Committee", *supra*.

Three of its recommendations were:

1. As a temporary measure, an auditor system similar to the one that was used in Massachusetts at that time. (Rep. 1934, page 210.)

2. The creation of panels of qualified members of the Bar by an appellate court to act as special judges or referees to supplement the work of the court by presiding over the trial of jury cases on consent of the parties. *Id.* page 218.

3. Temporary referees to whom compulsory references might be

2. Report of Adm. Office of U.S. Courts 1954, page 91.
3 Fed. Jud. *Statistics*, Shafroth—1948, Symposium on Federal Courts, Duke University Law School.

made in non-jury cases thus enabling the regular judges to devote their time to jury work. *Id.* page 224.

It described the Massachusetts system by saying: " . . . the court is empowered, in its discretion, to refer any case to a referee, who may not determine the case, but hears it and reports the facts involved to the court. He may be appointed at any time after the case is put on the calendar. Once appointed, he hears the evidence offered by both sides and makes a report to the court. In every such instance the right of the parties to a jury trial in court, if it is desired, is preserved in its entirety."[4]

Also, " . . . either party has the right after the report is filed, to have the case re-tried either before the court alone, or if a jury had been claimed, before a jury". In such trial the referee's report has the force of prima facie evidence.[5]

The Commission found that the cost of using the system in the Massachusetts court was $34.00 to $39.00 per case. The referees were paid the statutory fee of $25.00 per day. The Commission's conclusion was this: 'The results are so favorable that we recommend this expedient as one temporary means of clearing up the mass of cases in arrears in the Supreme Court Calendar."

This system was used in Massachusetts for seven years, prior to 1942, when the war relieved pressure of the dockets and it was discontinued. During these years the court disposed of 47,000 cases by its use, of which only about 1200 were tried by jury. Practically all the remainder were disposed of on the reports of the auditor.

In January, 1956, the Massachusetts Superior Court reinstated this system. This decision was announced in the *Boston Herald* of Sunday, January 8, 1956, where this headline appeared: "JUDGES ADOPT COURT SPEEDUP". The first sentence of this story is this: "A sweeping six-point program designed to break up a log-jam of cases which is delaying civil court trial as much as four years and two months in Massachusetts was adopted yesterday in an all-day meeting of the justices of the Superior Court."

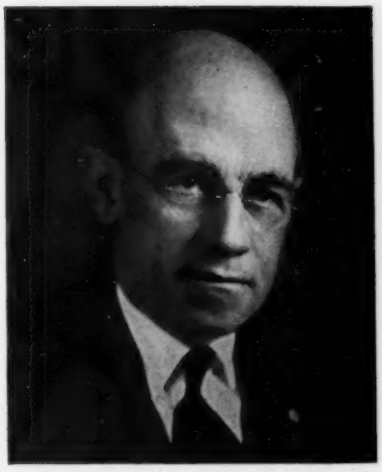
Absent Legislation . . . *The Power of the Court*

Justice Brandeis in 1919, had discussed the principles on which this system is based, in his opinion in *Ex parte Peterson,* 253 U.S. 300-312.

Referring to the inherent power of the courts he said "Courts have (at least in the absence of legislation to the contrary inherent power to provide themselves with appropriate instruments required for the performance of their duties. Compare *Stockbridge Iron Co.* v. *Cone Iron Works,* 102 Mass. 80, 87-90. This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause" (*id.* page 300-12)

In the *Stockbridge* case, *supra,* the plaintiff claimed that the defendant had tunneled under his land which adjoined the defendant's land and had extracted from it valuable ores. The court appointed viewers, who examined the mine and assessed the damage that had been caused by the defendant. Their report was submitted to a master on whose findings the court entered judgment.

Justice Brandeis said that the Seventh Amendment concerning the right of trial by jury does not prohibit the use of new methods for determining what facts are in issue or new rules of evidence. He adds: " . . . changes are essential to the preservation of the right" and holds, citing cases, that: " . . . it cannot be deemed an undue obstruction of the right to a jury trial to require a preliminary hearing before an auditor" (*Id.* page 310-11) or as "interfering with the jury's determination of issues of fact, because it directs the auditor to form and express an opinion upon facts and items in dispute. The report will, unless rejected by the court, be admitted at the jury trial as evidence of facts and findings embodied therein. . . .



Harry D. Nims practices in New York City. He received his preparatory education at Williams College and his legal education at New York University. Admitted to the New York Bar in 1901, he is the author of various articles and books on legal subjects.

The parties will remain as free to call, examine, and cross-examine witnesses as if the report had not been made." *Id.* page 310-11.

The auditor system can serve two purposes: it can dispose of backlog cases through the use of masters and it can remove from the backlog the never-to-be-tried-but-never-to-be-settled-until-faced-with-immediate-trial cases by its threat of immediate hearing. For experience has shown that when such cases are faced with immediate trial, all but a negligible percentage of them disappear from the docket and are never tried. That the auditor system can go a long way toward disposing of such cases fairly promptly has been demonstrated in Massachusetts.

The auditor system has never been used in New York and the current Temporary Commission on the Courts there recommends instead the orthodox, always popular with politicians, and seldom, if ever effective,

4. See REPORT OF COMMISSION ON THE ADMINISTRATION OF JUSTICE IN NEW YORK STATE, 1934, page 210. Justice Brandeis in *Ex parte Peterson,* 253 U.S. 300 *et seq.,* discusses the bases of the system.

5. See REPORT OF JUDICIAL COUNCIL OF NEW YORK, (1937,) pages 236-43.

method of reducing backlogs, *i.e.*, creating more judges.

In 1953, additional judges were recommended to the New York legislature by this commission. The legislature declined to act.

In 1955, the recommendation was renewed and the legislature under stiff political pressure authorized twenty-one such additional judges. The bill was vetoed by Governor Harriman.

It is estimated that these judges for their fourteen-year terms would have cost the taxpayers some $40,000,000 to $50,000,000 and it is very doubtful to what extent these judges could have reduced the backlog, for in the 1954-55 court year, 106 Supreme Court trial judges tried only 1896 jury cases.

The twenty-sixth New York Commission to study the courts was created in 1953. Between 1953 and May 1, 1956, it spent $488,592.32. Had methods similar to the Massachusetts auditor system been used in New York and the referees been paid liberally, the cost to the taxpayers of greatly reducing the backlog of the New York courts probably would have been far less than the expenses of this Commission.

The second recommendation of the New York Commission of 1934 to reduce the backlog was the creation, by an appellate court, of a panel of lawyers who would "supplement the work of the court by presiding over the trial of jury cases on consent of the parties". (Rep. 1934, page 218).

Both the Special Calendar Committee and this Commission believed that lawyers "of the highest standing and large experience will volunteer their services because the object to be accomplished will appeal to their professional sense of duty and patriotic service." (Committee Rep. 1927, page 18).

The "Judicial Survey Commission" in Massachusetts was appointed by Governor Herter in December, 1954, consisting of twenty-four members—lawyers, judges, businessmen and clergymen—to study the courts of the state. It reported in February, 1956. It discussed the congestion in the Superior Court which it reported, was the worst in the whole country and said: "We do not recommend that additional judges be appointed" (report page 6). Instead it recommended the use of more modern methods, such as general calls of all the civil cases in the backlog in all of the counties of the state to weed out old cases and an extension of pre-trial procedure to encourage settlement before trial.

Too Much Politics . . . *The Recommendation Ignored*

Of course this recommendation was ignored. It involved too much politics. Its use might reduce backlogs sufficiently to make it possible to argue that the judges did not have enough cases to keep them busy. That would remove an age-old argument for more judges and was unthinkable from a political point of view. The fact that the recommended device would give the public prompt justice was unimportant.

Judges chosen in this manner could and would give at least as effective service as the regular judges; and it is conceivable that in choosing such panels the court might imitate the policy of Lord Chancellor Jowitt of England who in the six years he was in office recommended no member of his own party for a judgeship.

The third recommendation of the New York Commission was the use of temporary referees in the trial of non-jury cases and equity cases, thus releasing regular judges from the trial of such cases and enabling them to devote all their time to jury work. (Rep. page 224). This would seem a rather harmless and practical device but has never been used to any extent in New York.

These forgotten recommendations of the Committee and the Commission are referred to here because the problems which they studied are almost identical with those that vex us today.

Reducing Backlogs . . . *Some Modern Methods*

In March, 1954, the Comptroller of the City of New York began to use pre-trial in pending negligence cases against the City. In 1955, 44 per cent of them were settled in this way. Now all such cases are pre-tried.

Reference has already been made to the "pre-trial-discovery" procedure recently adopted by the Circuit Court of Michigan, in Detroit, which requires a conference in each new case approximately one week after it is begun, which results in an ending, in these conferences, of approximately 30 per cent of both jury and non-jury cases.

This court holds a second conference about a month prior to actual trial in cases which are not disposed of by that time and further efforts are made to end them by agreement.

In Los Angeles, California, the Superior Court refuses to postpone trials by stipulation of counsel except for cause. If an adjournment is asked, instead of taking the case off the calendar it is adjourned to be reset after thirty days by stipulation or on motion. A judge of this court reports that while, on application for adjournment, counsel consistently urge that their cases will be eventually tried, it has been found that only about 50 per cent of those which go off the calendar on this basis are ever reset and the process is characterized as "most effective" to eliminate deadwood from the backlog.

The State of Oregon has statutes authorizing the use of temporary judges. One of these measures permits lawyers to act as judges on consent of the parties and with the approval of the court. Another provides for the temporary designation of lawyers as Circuit Court judges by the Chief Justice of the Supreme Court of the state when in his opinion it becomes, "necessary, proper or convenient that the services of additional circuit judges be provided". The third authorizes the Supreme Court to designate Circuit Court judges to sit on its bench when the

(Continued on page 684)

The Reed-Dirksen Amendment:

A Reply to Theodore R. Meyer

by **Robert B. Dresser** · *of the Rhode Island Bar (Providence)*

▪ **The Reed-Dirksen Amendment to the Federal Constitution, which has been endorsed by the House of Delegates of the American Bar Association, would reserve to the states the exclusive power to impose estate and gift taxes, and would limit the power of Congress to levy taxes on individual and corporate incomes by providing that if the top rate exceeds 25 per cent it can be no more than 15 percentage points above the bottom rate. Mr. Dresser, who has written several articles for the Journal on this subject, here takes issue with Theodore R. Meyer, of the California Bar, who opposed the amendment in the January issue of the Journal.**

▪ In a scholarly and carefully reasoned article published in the January, 1956, issue of the AMERICAN BAR ASSOCIATION JOURNAL, Mr. Theodore R. Meyer, of the California Bar, discusses the Reed-Dirksen Amendment and reaches the conclusion that it is "illogical, unsound and impractical".

The provisions of the amendment may be summarized as follows:

(1) The amendment limits income taxes on both individuals and corporations to a maximum rate of 25 per cent, but permits Congress, by a vote of three fourths of the members of each House, to exceed that rate at any time. When the top rate exceeds 25 per cent, however, it can be no more than 15 percentage points above the bottom rate. For example, if the bottom rate were 20 per cent, the top rate could not exceed 35 per cent. If the top rate does not exceed 25 per cent, however, there is no restriction at all on the bottom rate. It could be as low as 1 per cent, or ½ of 1 per cent. The Amendment does not require the rates on corporations and individuals to be the same.

(2) The amendment reserves to the states the *exclusive* power to impose estate and gift taxes.

The discussion of this subject involves three questions:

(1) Should our present system of taxing incomes, inheritances and gifts be changed?

(2) If it is concluded that our present system of taxing incomes, inheritances and gifts should be changed, can an enduring change be effected without a constitutional amendment?

(3) If it is concluded that our present system of taxing incomes, inheritances and gifts should be changed and that this should be done by amending the Constitution, is the proposed amendment the right sort of an amendment?

I shall discuss these questions in their order.

Question 1.

Should our present system of taxing incomes, inheritances and gifts be changed?

A. *First, as to Income Taxes.* Under our present federal tax laws we have a heavy, progressive income tax on individuals, running from a beginning rate of 20 per cent on $2000 and under to 91 per cent on incomes of more than $200,000, and a 30 per cent normal tax on the first $25,000 of corporate income, with a surtax of 22 per cent on income over that amount.

We have in this country an economic system commonly called the "private enterprise system", which is based on private capital and private ownership. This is the system under which this country has prospered beyond all others and grown to greatness. For this system to operate successfully there must be a steady continuing supply of new capital—billions of dollars each year—

Editor's Note: On April 24, 1956, the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, held a hearing on S.J. Res. 23, the Reed-Dirksen Amendment. All of the witnesses except three, Congressman Patman of Texas and two representatives of the A.F.L.-C.I.O. labor union, testified in favor of the amendment. Senator Dirksen made an excellent statement for the amendment. Two witnesses representing the American Bar Association testified in favor of the amendment. They were William Logan Martin, Chairman, and Robert B. Dresser, a member, of the Special Committee of the Association on "The Proposed Amendment to the Constitution of the United States Limiting the Power of Congress to Tax Incomes, Inheritances and Gifts".

to start new industries and to maintain and expand existing ones on which so many jobs depend. This capital comes principally from the savings of corporations and individuals. In the case of individuals, it comes mainly from those having the medium-sized and larger incomes. Excessive taxation lessens or destroys the incentive to produce, save and invest such capital in industry, and at the same time reduces the supply by the amount of the tax. The heavy progressive income tax strikes with particular force at this source of supply.

If the savings which constitute the source of capital supply are taken from the owners by taxation, the needed supply of capital will be reduced or stopped, and our private enterprise system will fail. It would then become necessary for the government to supply the capital. This means government ownership or control, which is Socialism.

Socialism Defined . . . *Its Ultimate Effects*

Socialism may be defined as government ownership or control of the means of production and distribution. Communism is an extreme form of socialism, with special emphasis on equality in the distribution of wealth. Both socialism and communism lead to absolute dictation by the government, complete regimentation of the people, the loss of their liberty and a lower scale of living for all. Throughout history, neither socialism nor communism has ever worked. Either will ruin any nation that adopts it.

With our heavy progressive income and death taxes, we are following the course prescribed by Karl Marx in his Communist Manifesto for destroying the private enterprise system by stopping the flow of private capital into industry and forcing industry to depend on the government for its capital. Let no one think this is a fancied and not a real danger.

In a statement to the Temporary Economic Committee prior to World War II, Adolph Berle, Jr., Assistant Secretary of State, said:

> The government will have to enter into direct financing of activities now supposed to be private, and a continuance of that direct financing must be [mean] inevitably that the government will ultimately control and own those activities. . . . Over a period of years the government will gradually come to own most of the productive plants of the United States.

Our Present Taxes . . . *Some Significant Figures*

The following figures are important:

One half of the total federal revenue of $60 billion is provided by the tax on individual incomes. Only 3 per cent of the total revenue (about $2 billion) is produced by the rates of this tax above 34 per cent. Thirty-five per cent is the highest rate that could be imposed (with the present beginning rate of 20 per cent) under the Reed-Dirksen Amendment.

The proposed increase of only $100 in the present $600 personal exemption and credit for dependents would result in a reduction of 7 million in the number of income taxpayers, and a revenue loss of $2½ billion.

A $20 income tax cut for all taxpayers and dependents, proposed in the last session of Congress, would have cost the government a revenue loss of $2 billion 300 million.

Eighty-four per cent of the revenue from the individual income tax is produced by the beginning rate of 20 per cent when applied to the entire amount of taxable income in all brackets.

Out of the estimated total of $123,500,000,000 of taxable income, only $9,900,000,000 is in the brackets over $10,000.

The amount of the tax on this $9,900,000,000 is $5,500,000,000.

By confiscating the entire balance above present taxes of this $9,900,000,000 of taxable income in the brackets over $10,000, only $4,400,000,000 would be added to the government's revenue. This would pay the expenses of the Federal Government for about 3½ weeks with a budget of $64,000,000,000.

Reducing the high surtax rates is not a discrimination in favor of the rich, as some assert. It is rather the partial removal of an existing discrimination *against* the rich of a most extreme character, ranging from 20 per cent to 91 per cent. This will benefit not only those in the higher brackets, but the people as a whole, as I have pointed out.

The experience of other countries, and most recently that of England, should be a warning to us to change our tax laws.

For many years England has had heavy graduated taxes on both incomes and inheritances. These taxes have so reduced the supply of capital that there has not been enough to provide her industries with the capital needed for modern machinery and equipment.

In his book, *Capitalism the Creator,* published in 1940, Carl Snyder said (page 345):

> The purpose of progressive income taxation is to strike hardest at these large incomes, the chief source of new capital supply. The State now expropriates a considerable portion of the income of the rich, the heavy saving class. With what result? The danger of extinguishing the larger part of the capital supply. *This seems what has happened in England in recent years. Not merely an impression. It is the conclusion of a competent student of the distribution of income in Great Britain, Colin Clark. And the outcome has been just that which might be predicted, a steady retardation of growth in British Industry.* [Italics mine.]

The *London Economist,* in articles dealing with the British experiment in socialism, has this to say:

> The standard of living of a nation depends . . . on the productive capital it possesses . . . much more . . . than on all other things put together.
>
> • • •
>
> The level of taxation is too high not merely because it is unpleasant for the taxpayers, but also, for the strictly economic reason that it has an unhealthy reaction on the output of the community. All down the line, from the surtax payer to the unskilled laborer, the *disincentive* effect of high taxation is plainly visible. Even more damage is probably being done by the

rapid depletion of the free working capital of business enterprises, and by the *virtual stoppage of private savings available for venture capital.*

• • •

It is all too easy for a democratic universal suffrage community to allow capital formation to be pushed to the wall. . . . Capital creation may be necessary; but there are very few votes in it. Yet the penalties for neglecting it, though they may take some time to mature, will in the end be inexorable. An installment is being experienced now. But if underinvestment continues much longer, then it may be wholly impossible to rescue the British economy. . . .

In an article by William Henry Chamberlin, published in the *Wall Street Journal* for January 23, 1956, at page 8, the author says:

Heavy and steeply progressive income taxation is proving to be the most effective instrument of social revolution in countries with a tradition of maintaining law and order and a prejudice against outright plundering.

The way of life of the British well-to-do and middle classes has been far more profoundly altered by the demands of the revenue service than by the transfer of the railways and coal mines to public ownership. And in the United States the same cause has produced similar effects.

Social and ethical values have been affected by the shift in the incidence of taxation. There was a time, not so long ago, when the individual was expected to provide for his years of retirement from active work. Anyone, by merely adding up the amounts he has paid to Federal and state tax collectors over the last 10 or 20 years, can calculate how very much more difficult it is under present conditions to make adequate individual provision for old age.

As a consequence there is much more dependence on state security and on private business pension funds. Independence has given way to dependence. Another result of heavy progressive income taxation is to dry up sources of private beneficence for hospitals, colleges, schools and other public institutions.

This trend is obscured now because of booming prosperity and because of the dazzling gifts of tax-exempt foundations, constituted out of fortunes which were made before current rates of taxation were ever dreamed of. But in the long run as the state takes more in taxes it must take over more and more the support of institutions which grew up on a basis of private initiative and philanthropy in times when the right of the individual to dispose freely of what he earned was unquestioned.

A British economist of international reputation, Professor Lionel Robbins of the London School of Economics, recently took a penetrating look at the consequences of heavy progressive income taxation in Great Britain. He was not very happy at what he saw. The British system of income taxation is much like the American, only more extreme, with lower exemptions, steeper rates and more confiscatory surtaxes.

Some of the more salient passages in Professor Robbins' study, published in a recent issue of Lloyd's Bank Review under the title "Notes on Public Finance," are so applicable to comparable American conditions as to be worth quoting:

"In the revolution of our time it is the tax machine which is the principal revolutionary agent. If I were asked to sum up in a word the salient characteristic of this revolution, I should choose the word collectivism . . . the tendency to shift more and more the sources of initiative to the central government and its organs.

"While, thank heaven, we are still far from the limiting condition in which there is only one property owner and one employer, we have gone some way along that road. There can be no doubt that the power of the state, relatively to other social elements, has greatly increased. And this seems very much to be regretted. . . .

"I think it is about time that someone who is not deeply involved personally, having chosen a different way of life, should say bluntly that the higher reaches of our own (taxation) progression are quite indefensible save upon an avowedly confiscatory theory. So far as earned income is involved, they constitute a discrimination against enterprise and ability such as has never before existed for any long time in any large-scale civilized community. Certainly they are not dictated by any needs of revenue; the upper rates of surtax could be just cancelled without creating any severe budgetary problem . . .

• • •

"There is nothing particularly neutral in the operation of the present tax structure. *Relentlessly, year by year, it is pushing us towards collectivism and property-less uniformity.*" [Italics mine].

In a statement entitled "Tax Policy in 1956", and dated December, 1955, the Program Committee of the

Robert B. Dresser is a member of the Rhode Island Bar and practices in Providence. He is a graduate of the Phillips-Exeter Academy, Yale College and the Harvard Law School, where he received his degree of LL.B. in 1906. He has written a number of articles on the subject of tax limitation.

Committee for Economic Development has this to say about our federal taxes (pages 6-8):

It is clearly desirable to reduce first those taxes which impede most seriously the growth of the economy. By fostering economic growth we are minimizing the burden of taxation. *As the economy grows the same tax rates produce more tax revenues.* Insofar as government expenditures can be held constant or reduced, the additional tax revenue made possible by growth can be plowed back into the economy in the form of tax reductions.

• • •

The Committee believes that the major tax impediments to growth in the economy are to be found in the prevailing rate schedule of the individual income tax. All income tax rates impede economic growth to some extent. But the effect of the present rate schedule on certain middle and upper bracket rates is disproportionately heavy, especially in view of the peculiar, risk-taking contribution which most taxpayers in these brackets make to the nation's economy.

• • •

It is the Committee's view that all income tax rates should be reduced, but that a relatively greater percentage reduction in tax should be made in the middle and upper brackets where extremely high rates are seriously interfering with the incentive to

take risks and with the supply and mobility of investment funds. In absolute amounts the savings will go largely to taxpayers in the lower brackets because of the large number of people affected.

• • •

The corporate income tax is so high now that it plays a large and unhealthy part in virtually all business decisions whether to invest or not to invest money. Furthermore, it is capricious in its impact on individuals, whether they are viewed as stockholders or buyers of the corporation's stock. [Italics mine].

One should not be deceived by the apparent prosperity despite high tax rates during the past decade and a half. It is the direct result of war and the accompanying inflation, an inflation which during the past fifteen years has cut the purchasing power of the dollar almost in two. Certainly we cannot continue to depend on a war-induced inflation to maintain "prosperity". The ultimate result is bound to be disastrous.

Depression and Boom . . . *The Experience of the Thirties*

The effect of our present system of taxation in normal times is shown by our experience during the thirties, a period in which we had the longest and most costly depression in our history, with unemployment of 10 million during much of the time. The depression lasted eleven years, and it took a war boom to end it. This was a period of high and increasing surtax rates with no war. High taxes, and in particular high surtaxes, were regarded as the principal deterrent to business recovery, and many economists and political, industrial and labor leaders urged their reduction as an aid to recovery.

The above period is the only one of any substantial duration since the enactment of the first Income Tax Act in 1913 which has been free from the artificial stimulus of war and its aftermath, and at the same time has had very high surtax rates. It therefore furnishes the only real test of the principles involved in this discussion.

B. *Secondly, as to the Estate and Gift Taxes.* The Reed-Dirksen Amendment also deprives Congress of the power to impose death and gift taxes and leaves these means of raising revenue exclusively to the states, where they belong, and where competition among the states would tend to keep the rates within reasonable bounds. Under existing laws the tax on the estates of decedents runs to a high of 77 per cent, and the tax on gifts to 57.75 per cent. These rates are manifestly confiscatory, and they have very harmful economic effects. They not only seriously impair the incentive to work, save and invest in productive enterprise, but they are extremely destructive of capital and, in the long run, will destroy the accumulations of capital that are so necessary for industrial activity and expansion, with the resulting beneficial effects on our economy.

Moreover, the heavy taxation of large estates compels the rich to seek comparatively safe liquid investments in order to provide for the heavy taxes that will be imposed upon their estates at death, thus further reducing the capital available for risky business ventures.

The harm done to the economy by the present high rates of death and gift taxes is out of all proportion to the revenue produced, and cannot be justified by any argument based on fiscal needs. Even with the very high rates now in force, the revenue from these taxes is comparatively trivial. In 1955, it was $936,000,000 from the two sources. This was about 1½ per cent of the total budget that year of $64,500,000,000—enough to pay the Government's expenses for about five days.

The gift tax is merely auxiliary to the estate tax, and both should be dealt with alike.

I submit that the evidence is overwhelmingly in favor of a change in our present system of imposing heavy progressive taxes on incomes, inheritances and gifts, and that Question 1, "Should our present system of taxing incomes, inheritances and gifts be changed?", should, therefore, be answered in the affirmative.

Question 2.

If it is concluded that our present system of taxing incomes, inheritances and gifts should be changed, can an enduring change be effected without a constitutional amendment?

Mr. Meyer argues that tax rates should not be fixed in the Constitution, and suggests that "if a majority of the people . . . think the high bracket rates are too high, there is a much simpler remedy than amending the Constitution. The remedy is to elect representatives who will reduce . . . high bracket rates."

I am sure all will agree that this remedy has not worked very well during the past twenty years. Today, after twenty years of confiscatory higher bracket rates, we witness the spectacle of the members of Congress, instead of granting relief to the taxpayers with the medium-sized and larger incomes, vying with each other in their efforts to win political favor with their constituents by tax handouts to the largest voting class, who little realize the harmful effects of such action on the people generally, including themselves; for it is crystal clear that every consideration of justice and the economic needs of the country demands that relief be granted the taxpayers in the medium and higher brackets. The proposed increase of $100 in the personal exemptions and credit for dependents and the $20 cut for all taxpayers and dependents would merely add to the present unjust and destructive discrimination against the larger incomes.

Our Present Laws . . . *Double Progression in Taxes*

This discrimination is even greater than appears on the surface. The federal income tax, and for that matter any income tax which uses both exemptions and progressive rates, is *doubly* progressive when measured against total taxpayer income. For example, a 20 per cent

(Continued on page 691)

An Instrument of Peace:

The Conciliation Court in Los Angeles

by **Louis H. Burke** · ***Judge of the Superior Court of Los Angeles County, California***

▪ **Judge Burke writes in a highly dramatic way of the operation of a unique domestic relations court in Los Angeles. Manned by a judge and three trained counselors, the Conciliation Court works with an estranged couple in search of a way out of their domestic differences. The results of the search are embodied in an agreement which is tailor-made for the parties and is backed by the contempt power of the court. So far, reconciliations effected by this unique system have proved successful in three out of four cases.**

▪ In all outward manifestations but one, the lady on the witness stand was typical of the majority—belligerent, hurt, vindictive, highly emotional, the doeskin of her gloves stretched smooth by the clenched hands. The experienced eye of the veteran judge in the Domestic Relations Court quickly noted the distinguishing exception. This woman was plainly fighting back the tears. To the judge, tears conceivably could mean remnants of love still remained. Always alert to the possibility of reconciling married couples even though they were perched on the threshold of divorce, he interrupted the proceedings to ask the attorneys if this were not a case which should be referred to the Conciliation Court for consideration. Before the lawyers could speak, all the wounded pride and hurt in the woman blurted out "How could I take him back after what he and 'that woman' have done? No, he can go his way and the children and I will go ours. We are better off without him."

"My client would like to have the Conciliation Court consider the matter", began the husband's lawyer, "although in view of the attitude of his wife there appears to be little hope."

The wife's attorney quickly arose and said, "It is the policy of our office never to oppose any effort at reconciliation. However, in this case, Your Honor, this man has been living in adultery and I fear that all the regard that my client once held for him is now dead. In any event, Your Honor, a temporary order will be necessary for the support of the wife and children and for attorney's fees and costs."

"We will not resist the making of any reasonable order," the husband's lawyer replied, "however, in the papers served upon us, the wife seeks by way of child support and temporary alimony a sum which exceeds the take-home pay of my client, which would leave him without any means of supporting himself."

At the suggestion of the judge the matter was passed on the calendar for a few minutes to permit the attorneys to confer. Thereafter, the details of a temporary order were agreed to by them in open court and the parties were then instructed to proceed to the office of the Clerk of the Conciliation Court for the filling out of the petition to commence the conciliation proceeding. An affidavit is also required which sets forth the basic information pertaining to the family and the causes of the difficulty. It concludes with a list of marriage complaints and each person is told to check off those which he believes contributed to the breakup of the home. In this case, the wife marked such things as "infidelity" and "immaturity" on the part of her husband, and "temper" on her part, with their intimate relations also checked as one of their difficulties. In response to the general question as to the cause for the breakup of the home, she stated that her husband had fallen in love with another woman and had been seeing her secretly.

The husband checked off "nagging" on the part of his wife, and on his own part "infidelity" and "in recent months—heavy drinking". The clerk gave the parties a date when they should return for their conference with the Conciliation Court Counselor, which would be about ten days thence. He explained that the attorneys would be welcome to be present if they desired and that

the proceedings would be very informal; the counselor would confer with each party and his attorney separately and then with the two parties present. The clerk stated that under the law, since everything that is said to the counselor is in confidence, and only for the purposes of the attempted conciliation, the attorneys would be excused when both husband and wife were present.

The clerk noted that a third person had been named by the wife and stated that in such cases the court sometimes felt it desirable to have such a person appear at the hearing so that the counselor could talk to her as well. The wife stated, "That's all right with me, but I certainly don't want to have anything to do with her."

"I don't think it is necessary to bring the young lady to court—however, I guess that would be up to the judge," the husband muttered.

Following the filing, each of the parties received a letter through the mails reminding them of the time and place of the hearing, and the third party was served with a court order to appear at the hearing.

A Charged Atmosphere . . . *The Conciliation Hearing*

On the day appointed each of the parties arrived by his own conveyance and entered the clerk's office separately. Naturally, with the two women seeing one another for the first time, from opposite corners of the reception room, and with the husband not knowing which way to look or what to do with himself, the air was charged with electricity. In a few moments the clerk called the husband and wife to the counter and invited them in to the counselor's office. The counselor arose to greet them and asked them to be seated across the desk from him. To put them at ease, he explained the concern of the courts over the breakup of the marriage, particularly in view of the fact that the family, he had noted, had three children, two boys of school age and a girl slightly younger. At the mention of the children, the father, who had been separated from them for several months, showed visible effort to control an engulfing wave of emotion.

The counselor stated that he was there to serve the husband and wife, that the court would not force either of them to do anything that he or she did not wish to do, but would merely offer them the opportunity separately, and then together, to discuss with him the problems of the marriage in order that the possibilities of reconciliation might be fully explored. He asked which one wished to speak first and the wife indicated that her husband should since the breakup was "his fault".

"Very well", the counselor stated, "and while you, Madam, are seated in the reception room I want you to read this copy of a typical reconciliation agreement as entered into by parties who have been reconciled in the court. It may serve to recall to your mind domestic problems which are also present in your marriage which you may wish to discuss with me. It will also give you an idea of the type of agreement which would be worked out with you in the event that a reconciliation would be agreed upon in your case. Such agreement would deal only with the particular problems of this family."

Having the wife read the agreement while her marital partner was relating his side of their difficulties would help occupy her mind during the forty-five minutes or an hour that her husband would probably remain closeted with the counselor. With his practiced talents for eliciting the confidence of parties appearing before him, his warmth of personality, genuine interest and desire to help, the counselor soon learned what sort of man it was who faced him. This marriage had been a happy one for twelve years, but little by little as the man became more and more preoccupied with his work and paid less and less attention to his spouse, and as the wife in turn became more absorbed with the problems of her growing children, the two began to take each other for granted and to pay little or no attention to the ever-present need of nurturing their love for one another. One by one, subconsciously, and later with full awareness, the wife had noted a disappearance of each of the little attentions which she had been accustomed to having her husband pay her and which she had come to count on as evidence of his love. No longer did he notice and comment upon her clothes or the manner in which she fixed her hair, forgotten was the hug and kiss upon his return from work; anniversary dates were skipped; now, she brought in the heavy package of groceries without his jumping to assist her; and on one occasion, while preparing for their intimate union, he had calmly discussed a big deal which had loomed up in the office that day. She had become just one of his possessions, she felt, just there for his convenience.

With his omission, one by one, of all the little tender acts which in former years he had utilized to condition her mentally and physically for love making, she found herself first unwilling and later unable to respond. As a result she sought one excuse after another to repulse or escape his attentions. To compensate for the increasing coolness between the husband and the wife, the wife found herself showering more and more love on the children and paying less attention to her husband. She also ceased paying attention to her own appearance and her attractive face and trim figure began to suffer.

Trouble Looms . . . *The Other Woman*

It was about this time that the husband had met the young lady now seated in the outer office. He had seen her many times at her desk behind the polished mahogany counter at the bank, always alert to be helpful to others. Her appearance invited confidence. She was quick, direct, capable and attractive, and yet possessed of an impersonal reserve which served her and the bank well. Her rise to the position of a junior bank officer had been well deserved.

In her earlier years, she had devoted herself to the care of an inva-

lid father and the opportunities for outside activities had been few. With his passing, she had calmly taken inventory and, not given to self-deception, she decided that romance had passed her by. She lost no hours in sympathizing with herself and accepted the comforts of business success and the service of others to fill the well of loneliness within her.

It was at a business party in the holiday season that the husband had really gotten acquainted with her for the first time. Each had attended with only the thought of the conviviality of the season. Inhibitions lowered as infectious good cheer mounted. What had started as a friendly kiss suddenly wasn't just that. As they withdrew, troubled eyes quickly probed to learn how much had been revealed, then turned away —but the spark had caught in the dry tinder.

To him, the soft music and solitude of her apartment, her warm acceptance of his attentions were in marked contrast to the turmoil at home, with the youngsters bickering over TV programs, neglected radios blatting upstairs and the ever-sharpening edge on his wife's voice when she spoke to him. To the pricking of his conscience, he told himself he was doing the girl no harm. She was obviously in need of affection and with it had become radiant like a tree in Indian summer. She would be able to lead a fuller and better life by this experience, he felt sure, and, after all, she did know that he was married and that nothing serious could ever come of the affair. He also consoled himself that his wife knew nothing of all of this and consequently neither she nor the children could be harmed.

But fate played it differently! The young lady fell in love with him—hopelessly and completely. She had never before met anyone who was so thoughtful and kind, who asked less of her, but for whom she wanted to do more. She literally walked on air and refused to look beyond his next visit. For her, reason and judgment went out the window when love flew in. Her whole life hung on the few stolen hours a week that they could spend together.

As for him, anaesthetized by the comforts of the moment, he kept pushing back into his subconscious the ever-growing realization of what he was beginning to mean to this girl. To climax it all, fate let the wife in on the secret—it is unimportant how—and then things flew high and wide (but not handsome). For the wife, the revelation of the affair came first as a deadly traumatic shock, then, with her quick temper, hot harsh words, dishes, everything flew; it was the end! For her, no explanations on his part were even conceivable, and the husband, after a few feeble attempts, quietly packed a suitcase of bare necessities and took a room at a neighborhood hotel.

The wife continued to live at home with the children and every evening at seven he would phone them at home to say hello to each in turn. Several months had passed and the divorce proceedings were instituted by her. The separation had left a mark on the children too. The little girl missed her daddy so and the end of nearly every phone call found her fighting back the tears. To her mother, the wide eyes of the child were full of reproach. The boys were starting to have trouble at school and Danny, the younger and most like his mother, came home one day with his hand all wrapped up in his handkerchief. While the family doctor applied the cast, the boy told him that the fight had started when another boy had asked him whether his father had left them for good.

Not all of these facts were made known to the counselor through the interview with the husband alone. They are the composites of bits of information obtained from both. The husband volunteered to the counselor that he still loved his wife very much and that the thought of continuing to live away from his children was simply killing him. He ended by saying that he had made a grave mistake, but that it was just too late to do anything about it.

"If your wife would reconcile," the counselor asked, "would you agree to stay away from the young lady under penalty of going to jail?" The man replied quickly "I would. I would promise anything within my power, but she will never forgive me. It is hopeless."

"What about the young lady?" asked the counselor.

"She is really a very nice girl. It is all my fault. After a while I came to realize how wrong it was, but by then I just didn't have the heart to hurt her. I kept feeling sorry for her and for myself. However, my wife is my wife and I will never love anyone as I love her."

Louis H. Burke has been a judge since 1951 when Governor Earl Warren appointed him to the Superior Court of Los Angeles County. A graduate of Loyola University (Los Angeles), he practiced in that city from 1927 until his appointment to the Bench except for two years in the Army, being separated from the service in the grade of major.

The Other Side . . .
Conference with the Wife

"Let me see what I can do", the counselor said as he ushered the man out and handed him a copy of the typical reconciliation agreement to read. He asked the wife to come in. She sat on the edge of the chair in his office her eyes full of tears. She laid her copy of the agreement on the desk obviously affected by what she had read in it. "So many things apply so directly to our marriage; in

reading it over I had the feeling we had already talked to you and that you had written it about us. I only wish we had read it together a year or so ago when we began drifting apart. We might have been able to understand one another better and to talk things out before it became too late. Now, of course, that woman has her hold on him." She paused. "And anyway we have hurt each other beyond repair."

"I believe that is where you are wrong" the man across the desk said quietly to her. "Your husband sat here for three quarters of an hour and mostly he talked about what a wonderfully fine and kind person you are and what a happy life you all had together until, as you say, for some reason you started to drift apart. I believe I can help you put your finger on the reasons why you struck a lull in your marriage, but first let's talk about the other woman", he said.

"In the first place what happened between your husband and this girl was wrong—very wrong—and it caused you a lot of pain. To you what happened is unexplainable. Try as you might, you cannot imagine yourself entering into such a relationship with some other man. This is largely because with you an intimate union with someone is only conceivable as part of a deep and abiding love that you would feel for that person. And that is as it should be. With some men, and to a lesser degree with some women, love and intimacy are not necessarily so interrelated. The relationship with this woman does not mean that your husband stopped loving you. I am not saying this to mitigate his wrong, but to point out that it is entirely possible for a person to have a sudden infatuation for someone else and even become intimate with her without losing his real love for his marital partner.

"No one goes through life without making mistakes", he continued. "Each is human, and it is human to err. The important thing is that we recognize the mistake, feel sorry for it, seek to right the wrong done and have a firm purpose of amendment. These things your husband has done. It is within your power to forgive him, and after all how can any of us ask Almighty God to forgive our transgressions if we do not forgive those who transgress against us?" With this question, the counselor paused.

"But how could I ever be sure it would not happen again?" she asked.

"Your husband has agreed to promise in writing that he will never consort with the lady again under penalty of going to jail. This is how sincere he feels about it. For a man of his standing, the penalty of jail assures you that his promise is not one that has been lightly made."

The counselor then explained that everyone requires a certain amount of attention and love—some more than others; that chance had thrown her husband and the girl together at a time when the outward manifestations of affection between husband and wife had hit their lowest level. Gradually the wife was brought to realize that this low point was a joint responsibility which she shared with her husband.

"Love is a gift of one's self to another," the counselor explained. "In essence it must be reciprocal. When we cease making sacrifices for one another, when each takes the other for granted, then love lies dormant or even worse, and the situation is ripe for disaster."

By now the wife was ready to admit some of her own shortcomings—she acknowledged how hard the children were taking the separation from their father, and for the first time expressed the wish that they could forget what had happened and start again.

"Let me ask your husband to step in for a moment", the counselor said, and when the wife did not object he opened the door and asked the husband to come in. As the husband entered the door, the counselor excused himself saying that he must talk to the young lady a moment and would do so in another office. The wife arose from the chair and walked into her husband's arms with heart-rending sobs. The husband muttered "Thank God, thank God . . ." over and over again as the counselor quietly shut the door.

The Third Party . . . *The Young Lady Confers*

When the young lady came into the other office, she was uncertain, ill at ease and full of resentment at being dragged into this family affair. However, much of this head of steam disappeared after the counselor told her how highly the husband had spoken of her and how genuinely sorry he had been for having placed her in this position. He explained that the husband assumed full blame for what had happened. A warm-hearted, generous person, tears came to the young lady's eyes very quickly. "I have never met anyone like him before. It was really my fault as much as his. I had no intention of breaking up their home. I knew how he felt about his children; he used to speak often of them to me, even showed me their pictures from time to time. I was just wilfully blind I guess, but I do love him, and what do we do now?"

The counselor explained the husband's agreement not to see her any more as a condition on which the reconciliation with his family would be based. "Would you be willing to help him to keep that promise?" the counselor asked.

The young woman's head lowered and in a voice barely audible she said "Since that is the way he wants it, yes I would, but you don't know how much I will miss him."

In a few moments more all three parties had signed a simple agreement in which it was stated that the husband and the girl would not consort with each other again; it was taken in for approval by the judge and a court order made by him requiring each to comply with his agreement under penalty of being held in contempt of court. With this done, the young lady left the scene.

(*Continued on page 690*)

Specialization in the Law:

A Retort to Professor Joiner's Call for Control

by **Roger B. Siddall** · *of the Virgin Islands Bar (St. Thomas)*

In the December issue of the Journal (41 A.B.A.J. 1105), Professor Charles W. Joiner of the University of Michigan Law School argued that unregulated, unrecognized specialization in the practice of law was endangering the profession. Mr. Siddall takes issue with Professor Joiner in this article, arguing that the legal profession has a long way to go before it is ready for the kind of certificated specialists recognized by the American Medical Association.

The December, 1955, issue of this JOURNAL carried an article by Charles W. Joiner, Professor of Law at the University of Michigan, with the alarming title: "Specialization in the Law: Control It or It Will Destroy the Profession". 41 A.B.A.J. 1105. Having myself started out as a legal specialist within a year and a half after my graduation from Harvard Law School in 1921, and being still today a legal specialist, and never having been under control by anyone in the selection of the several specialties I have practiced, I rise to defend myself and the many other lawyers who are similarly situated against the charge that if we are not put under control to a greater extent than the general practitioners with whom we often compete the legal profession will be destroyed.

The article with the alarming title was the second on the subject by Professor Joiner. The July, 1953, issue of this JOURNAL carried an article titled "Specialization in the Law? The Medical Profession Shows the Way", 39 A.B.A.J. 539. In this first article the professor described in detail the development of medical specialties during the past several generations through the formation of medical specialist societies until finally, under the leadership of the eye doctors, in 1916 they began to issue certificates of expertness in special fields. In the nineteen thirties this practice expanded rapidly through co-operation of the medical specialist societies, the interested sections of the American Medical Association and the Advisory Board for Medical Specialties. At present nineteen boards have been formed like the American Board of Ophthalmology and they have issued certificates to something over a quarter of all the medical doctors in the country, who by virtue of holding such certificates are entitled to call themselves "Diplomates". It is advisable but not necessary to be a Diplomate to practice a specialty. Some of the leading specialists in the country are not Diplomates.

The theme of "Specialization in the Law: Control It or It Will Destroy the Profession" is that in the same way that specialization nearly destroyed the medical profession before it was put under control by the American Medical Association, so specialization will destroy the legal profession if it is not put under control by the American Bar Association.

The trouble with this article and this theme is that the premise is quite false. Specialization never threatened destruction of the medical profession. On the contrary the development of specializations in medicine has proceeded for more than a century along what I would regard as far more healthy lines than the corresponding development in the law, and certainly it is true that the doctors have given far more thought to the subject and held many more meetings about it than we lawyers have.

A Medical Example . . . *Psychiatry as a Specialty*

Let us consider, for example, that most difficult of medical specialties —psychiatry. The American Psychiatric Association, under the name of The Association of Medical Superintendents of American Institutions for the Insane, was founded in 1844 and immediately undertook publication of its specialty periodical, the *American Journal of Insanity*. This was three years before the first move was made in founding the American

Nyholm-Scherck

Roger B. Siddall, A. B. Oberlin 1918, LL. B. Harvard 1921, practiced admiralty law with one of the large firms in New York City for twenty-five years. Then, following an illness, he took two years and a half off to study the partnership organizations and arrangements of large firms of lawyers and of medical doctors. He now makes his headquarters in St. Thomas, Virgin Islands, and specializes as consultant to such firms in various cities of the United States.

Medical Association. The Association of Medical Superintendents of American Institutions for the Insane grew with the years in size and wisdom and when as a result of the spectacular achievements of Sigmund Freud, Clifford W. Beers and others it became apparent that there was a wide field for the application of psychiatric techniques outside of insane asylums, the name of the association was changed to American Psychiatric Association and the periodical to *American Journal of Psychiatry*. Then when the time came in the nineteen thirties for a profession-wide categorization of medical specialties the American Psychiatric Association assumed its full share of the burden in co-operating with the American Medical Association and other medical societies in establishing a board with jurisdiction to grant certificates of expertness in the specialties of neurology and psychiatry. The American Board of Psychiatry and Neurology, Inc., was incorporated in 1934 and immediately commenced examining applicant physicians and issuing certificates.

The same pattern was followed with minor variations in the establishment of each of the other eighteen boards which possess generally recognized exclusive authority to grant certificates of expertness in the medical specialties and to authorize their certificate holders to call themselves Diplomates. The prior existence of the specialists' societies was the basic foundation upon which the present-day structure of certified medical specialization was built.

We in the law do not have any foundation comparable to that which the medical doctors built up prior to the establishment of their boards and we are, I submit, wholly unprepared at the present time to undertake in any official way the issuance of certificates of expertness in special fields of law practice. This is not to say that many of us are not skilled in special lines of practice, for, of course, many of us are, nor is it to say that we should not increase our tendencies towards specialization. I think we most certainly should. At present, however, most of our specialization is done in the large offices. A firm, for example, with twenty partners and thirty other lawyers in the office can develop specialists in quite narrow fields and yet render a well-rounded general service to its clients. There is no need for officially issued certificates of expertness in such a case. The partners criticize and appraise the abilities of one another, as well as of the staff lawyers, and specialized expertness is soon perceived and fairly judged. It is only where specialization is developed by solo practitioners or small firms that there could be any need for certificates comparable to those that are issued to medical specialists.

And we in the legal profession are not, I submit, close to being ready for widespread specialization by solo practitioners and small firms in a way similar to that practiced by the doctors. Often I doubt if we ever will be, for we can never be ready until first we have developed an ethic similar to that which has been studiously cultivated by the medical profession for a century, but which we in the legal profession would, I feel sure, stubbornly resist. If Dr. *X* refers a patient to Dr. *S*, a specialist, Dr. *S* generally acknowledges in writing the referral of the patient and Dr. *S*, even though he might be engaged in general practice as well as in his specialty, would send that patient back to Dr. *X* for any treatment except that for which the patient was specifically referred. From the beginning of medical training on throughout his practicing life it is hammered into a doctor as a cardinal principle that he must not in any circumstances criticize the work of another doctor in the hearing of a patient and that he must never take a patient away from another doctor unless the other doctor requests it or at least consents. I have had doctors refuse to treat me when I needed treatment and asked it of them, because I had previously been going to another reputable doctor in the community and they said I should stick with him. Even though I replied that I had grown to dislike this other doctor and said that I wanted to change, still they walked out on me.

Rightly or wrongly, we in the law do not have such an ethical concept. We practice in courts where it is not merely a privilege but it is our solemn duty to criticize our brothers at the Bar in the hearing of our clients and of their clients. We take pleasure and honor in beating the stuffing out of fellow members of the profession and recording our victories in countless volumes of law reports. We have no ethical rules against serving a client who has previously been represented by another lawyer in the community. On the contrary we are taught that clients have a constitutional right to be represented by lawyers of their own choosing and, to the extent that we are capable of rendering the service and the applicant is able to pay a

fee, we are like common carriers, bound to serve applicants as they apply to the extent of our capacity.

We Must Face It . . . *An Age of Specialization*

This is an age of specialization, there is no doubt about that; and we lawyers have got to face the fact that if we are to serve our clients properly we must specialize to a greater extent than we have been doing in the past. But to follow the lead of the medical profession as Professor Joiner suggested in his first article would require the specialists to become lawyers' lawyers and to refuse to serve the lay public except as clients were brought to them by other lawyers.

The way of the doctors may be the way we are headed; I do not say it is not; but we are many years behind the doctors in our development of specialization and we are surely not prepared at present for the appearance of officially certified legal Diplomates. Professor Joiner shows concern, and I think he rightly shows concern, that finely divided specialization might have a disintegrating effect on the practice of the profession as a whole. With due respect, however, I suggest that Professor Joiner puts his finger on the wrong point when he attributes the avoidance of this disintegrating effect in medical practice to the system of certifying Diplomates. It seems clear to me that the reason medical practice has remained satisfactorily integrated in the big centers of population, while at the same time having become highly specialized, is the integrating force of that largest group of medical specialists, the internists, the specialists in internal medicine.

An internist is fundamentally a specialist who specializes in not specializing. All medical knowledge is his field. He must try to keep abreast of the advances in all the branches of his profession. This is because the internist is a specialist in diagnosis. It is to him that the patient first comes with his aches, his fevers or his sores. It is he who must decide whether the patient's complaint can be effectively treated by the relatively simple means which he himself can employ or whether the services of a specialist are required and if they are which variety of specialist is the one needed.

It is true that internists sometimes practice subspecialties themselves, such as allergies or heart diseases, but primarily the internist is a general practitioner except that he does not poach on the fields of the specialists. Wherever a specialist is available and the internist has diagnosed the patient's trouble as within the jurisdiction of that specialist, the internist will refer the patient and not try to treat the trouble himself.

Where specialization is practiced by lawyers grouped together in large law firms, certain of the partners tend to develop as specialists in client contacts along lines quite parallel to those which guide the internist. These men are called contact partners. They maintain a close association with individual clients and with policy-making officials of corporate clients. They sometimes serve on boards of directors of corporate clients or act as general counsel to the company. They belong to clubs and have lunch or play golf with their personal clients so that it is easy for opportunities to arise for the client to tell his troubles to his lawyer. They listen carefully to the troubles which the client tells them, and when they think the client needs the services of a lawyer they tell him so and bring him to the office where he is introduced to the appropriate specialist, if he does not already know him. Of course, the client's troubles may be in a field where the contact man is able to handle them himself, but very often another one of the partners takes over and assumes responsibility for that particular matter or case. He is called the responsible partner. In a smoothly operating large law firm where there is not an undue strain of competition among the partners every case or matter in the office has a responsible partner who is in charge of it, and a contact partner who may be the same but more likely is a different man. It is the responsible partner who does the legal work, either himself or through his assistants, but it is the contact man who, to use the vernacular, sells the client on the job that is being done for him.

It appears to me that if we in the law are to follow in the footsteps of the doctors and develop a considerable degree of specialization among solo practitioners we shall have also to follow the doctors and develop as our largest body of specialists a group of legal internists or client contact men, men with broad legal training and high ethics to whom the lay public will go when they feel the need of a lawyer, men who will unselfishly pass the client along to a specialist if it is a specialist he needs, and, if we are to follow the doctors, men who will not demand that the specialist split the fee, but who will sternly demand a loyalty from the specialist that would be strong enough to prevent the specialist from stealing the client.

Is it an idle dream or will it eventually come to pass? I don't know, and I don't think you do.

The 1954 Internal Revenue Code:

Gains and Losses on Sales and Exchanges

by Brady O. Bryson • *of the Pennsylvania Bar (Philadelphia)*

■ This is another in a series of articles written by members of the Section of Taxation intended to acquaint members of the Bar generally with some of the more important aspects of and recent changes in basic tax law. A part of the emphasis in this series will be, when appropriate, on the Treasury Regulations. The entire series is being prepared under the supervision of the Publications Committee of the Section.

■ Probably no area of federal tax law commands wider attention than that of capital gains and losses. The favored tax status of long-term capital gains in a day of high surtaxes has profoundly affected the American business scene, giving rise to a nation-wide quest for these relatively tax-sheltered opportunities. Television comedians, famous authors and movie stars have developed intense personal interest in the rules by which these benefits are obtained, along with numerous others whose activities are less well publicized.[1]

The Internal Revenue Code of 1954 made no alterations in the basic treatment accorded capital gains and losses. However, the 1954 Code did revise the treatment of some special situations in each of the three fundamental divisions of the capital gains mechanism—the recognition of gains and losses, their measurement and, finally, their classification as capital or ordinary.

Recognition of Gain or Loss on Property Disposition

Three significant changes were made in the rules for recognition of gain or loss on the sale or exchange of property, adding to the number of situations in which gain or loss is not recognized.

1. *Tax-free exchanges of life insurance contracts.* Formerly, the exchange of an insurance policy for a different policy resulted in taxable gain when the value of the new policy exceeded the premiums paid on the old. This was a serious obstacle to taxpayers in rearranging their life insurance programs to adapt them to changed circumstances. A taxpayer who exchanged a life insurance contract for an endowment or annuity contract ordinarily found himself faced with a tax, although he derived no economic gain from the exchange.

Section 1035 of the new Code remedies this situation by providing for non-recognition of gain or loss on (1) the exchange of a life insurance contract for another life insurance contract or an endowment or annuity contract; (2) the exchange of an endowment contract for an annuity contract or for another endowment contract providing for payments to begin no later than the beginning date under the old contract; or (3) the exchange of an annuity contract for another annuity contract.

The new provisions continue the recognition of gain on exchanges which have the effect of deferring the receipt of payments (such as an exchange of annuity for an endowment contract or an endowment for a life insurance contract), in order to prevent shifts designed to avoid income tax by increasing the likelihood that payments under a contract will be received as non-taxable life insurance death benefits.

2. *Non-recognition of gain to corporations on transfers of treasury stock.* There was no specific provision in the 1939 Code with respect to the tax consequences to corporations on the sale of treasury stock or its issuance for property. The Treasury maintained that where the corporation "deals in its own shares as it might in the shares of another corporation" gain or loss should be recognized, Regs. 118, §39.22(a)-15(b), and argued that the corporation's mere purchase and re-sale of its shares constituted such dealing, regardless of the reasons therefor. See *United States* v. *Anderson Clayton & Co.*, 350 U.S. 55 (1955). At the time of the enactment of the 1954 Code, there was uncertainty as to the situations in which gain or

1. The effect on business methods and morals has also provided inspiration for a recent best-selling novel, CASH MCCALL, by Cameron Hawley, the central and title character of which is a capital gain operator of some proportions. See also Hawley, *Morality v. Legality*, 27 PENNSYLVANIA BAR ASSOCIATION QUARTERLY 230 (1956).

loss would be recognized.

The new Code cuts away all doubt, as well as all distinctions, by freeing from tax all exchanges by corporations of their own stock for money or other property. (Section 1032). The Code is silent, however, as to the issuance of stock for services, as under executive compensation plans. Evidently the new provision applies no matter how vigorously the corporation trades in its own stock or to what extent it is motivated by the hope of profit, although the Treasury may attempt to exclude active trading for profit from coverage, in spite of the broad language of the new section.

The recent decision of the Supreme Court in the *Anderson Clayton & Co.* case has diminished somewhat the importance of Section 1032. The Court ruled that no gain was to be recognized even under the 1939 Code so long as the corporation's purchase and resale of its stock were motivated by an "intra-corporate purpose", in that case to place more stock in the hands of top executives.

3. *Refinements to non-recognition of gain on sale or exchange of residence.* The Revenue Act of 1951 gave needed relief to taxpayers who change their places of residence in a sustained period of rising real property values. It provided for recognition of gain on the sale of a residence, when another residence is purchased within one year before or after the date of the sale, only to the extent that the investment in the new residence is less than the amount realized from the sale of the old one. (1939 I.R.C. §112(n); 1954 I.R.C., §1034). The basis of the new house is required to be adjusted downward in the amount of the gain not recognized. However, as it existed prior to the 1954 Code, the provision was inadequate because it ignored selling commissions and expenses of readying the house for sale. In other words, in determining the portion of the total gain (whatever it might be) to be recognized, the investment in the new residence was compared with the sale proceeds of the old, before commission and without regard to pre-sale renovation expenses.

The 1954 Code takes care of this difficulty by providing that the two types of expenses mentioned are to be deducted from the selling price of the old residence in determining the amount available for investment in a new home. To assure that the new provision is not abused, it provides that "fixing-up" expenses must be for the purpose of facilitating the sale; the work must occur within ninety days preceding the making of the sale contract; and it must be paid for within thirty days after the closing.

It is not entirely clear whether the new rule applies to "fixing-up" expenses of a capital nature. Nothing in the statute would preclude this unless it is the use of the term "expenses". In either event, the cost of the capital improvements should, as usual, be added to the basis of the old residence in computing gain. The new rule has only to do with ascertainment of the portion of the gain not recognized and applied as a basis of the new residence. It does not affect the amount of the gain realized. For this reason perhaps the term "expenses" should be liberally read to include renovation costs of a capital nature, since this kind of fixing up also creates a cash problem for the taxpayer. The Treasury takes the opposite view, however. (See Tentative Regulations, §1.1034-1 (b) (6); see also 1954 Code, Senate Report, page 427, excluding expenses "taken into account in computing gain".)

Determining the Amount of Gain or Loss

There are two noteworthy changes in the rules for determining the amount of gain or loss on the sale or exchange of property, both dealing with the important and difficult question of the basis of property acquired from a decedent.

1. *New basis for all property included in a decedent's taxable estate.* Many items of property not included in the probate estate of a decedent are included in his taxable estate for estate tax purposes. Under the 1939 Code some of these classes of property were consequently given a new basis at the decedent's death equal to the value of the property of that time, even though strictly speaking, not passing from the decedent at that time. These included property previously transferred to a revocable trust, or to a trust in which the decedent retained the power to amend or terminate; and property passing under a general power of appointment exercised in the decedent's will. On the other hand, other property similarly included retained its old basis. This was true in the case of property held as a joint tenancy or tenancy by the entirety, property previously transferred subject to a retained right to the income for life, and property subject to the decedent's unexercised power of appointment.

The 1954 Code eliminates this inconsistency by providing, in substance, that all property included in the decedent's taxable estate acquires a new basis equal to the value of the property at the date of the decedent's death (or the optional valuation date, if such date is used by the estate). Section 1014 (b) (9). Where the property was acquired from the decedent prior to his death, the new basis attaches only if the donee has not sold or exchanged it prior to the decedent's death.

The provision does not apply to "income in respect of a decedent" which includes rights to income unrealized at death. These rights acquire no basis by inclusion in the decedent's estate, and they are fully taxed as income to the recipient (the decedent's estate or beneficiary). The recipients are thereupon allowed an income tax deduction for the estate tax paid on such items.

2. *Adjustments to basis for depreciation, depletion or amortization prior to the decedent's death.* In the situations just described, a

donee who has held property for years and deducted annual depreciation on it may suddenly find himself with an entirely new estate-value basis by virtue of the inclusion of the property in the donor's estate upon the latter's death. Under the 1939 Code, no adjustment was required for this prior depreciation at the time the property acquired the new estate-value basis.

Section 1014(b)(9) of the new Code now requires that depreciation deducted by the donee prior to the decedent's death be subtracted from the value of the property at death in determining the basis of the property in the hands of the donee for subsequent depreciation. A similar adjustment is required with respect to depletion or amortization.

This adjustment is open to serious question. Depreciation enjoyed by the donee before the decedent's death represents an allowance for the use or exhaustion of the property during that period based on previous capital investment; moreover, it represents an allowance which the donor would otherwise have enjoyed himself. The estate tax—a tax on capital values—is the price of a new basis in the ordinary situation, and should also be here. If depreciable property with a basis of $100,000 is given to a donee at a time when its remaining useful life is twenty years and is included in the donor's estate ten years later when its value is only $50,000, the donee will ordinarily have enjoyed depreciation deductions (disregarding salvage) of $50,000, and after deducting them from the estate tax value he will have a new basis of zero for the future. Together, the parties will have enjoyed depreciation deductions of only $50,000 on an original basis of $100,000. This seems to penalize unfairly the donee, and it is hoped that a future Congress will recognize the unfairness and eliminate the adjustment. The existing provision may reflect a belief on the part of Congress, influenced by the inflation and economic growth of recent years, that the property would probably have appreciated in value enough to offset the depreciation allowances, so that the donee would have a new basis of $100,000 upon the donor's death in the absence of the adjustment. If so, the provision certainly rests on a most unusual and untenable economic premise.

What Is a Capital Gain or Loss?

There are seven significant changes in the sections dealing with the classification of capital gains and losses, each designed to accord or deny capital gain or loss treatment to a particular type of transaction.

1. *Real property subdivided for sale.* A difficult factual determination, in which no single test is decisive, is ordinarily encountered in ascertaining whether real property subdivided and sold by the individual investor is a capital asset. The 1954 Code contains in Section 1237 some new special statutory rules on this subject. While not a complete solution to the problem, they do provide the answer in some cases and essentially are based on variations of the judicially created tests in the "dealer v. investor" area. See Weithorn, "Subdivision of Real Estate, 'Dealer' v. 'Investor' Problem", 11 *Tax L. Rev.* 157 (1956).

The scheme of Section 1237 is to provide capital gain (and loss) treatment, in general, where an individual has held a tract of real property for a period of 5 years, is not otherwise in the real estate business, and subdivides and sells unimproved lots from the tract. A "tract" is a single piece of real property, or two pieces which were at any time contiguous in the hands of the taxpayer, or which would be contiguous except for separation by a road, stream or street. If, after the sale of one or more lots from the tract, no further sales occur for five years, the remainder is deemed a "tract", and the earlier sales are disregarded.

The general rule is that lots in a tract do not cease to be capital assets (assuming that they otherwise are capital assets) in the hands of an individual owner merely because the owner subdivides the tract and carries on sales activity incident to a disposition of the lots. This rule applies, however, only if *all* the following conditions are satisfied:

1. The tract, or any lot therein, has not previously been held by the taxpayer primarily for sale to customers (unless at such time Section 1237 would have applied).

2. The taxpayer does not in the taxable year hold other real property for such purpose. The statute literally would seem to require only that *either* requirement (1) or (2) be met. The legislative history is to the effect that *both* must be met. See Senate Report No. 1622, 83d Cong., 2d Sess., page 442.

3. The lot sold (unless acquired by devise or inheritance) has been held for five years or more.

4. The taxpayer has not improved the tract. Improvements which are not "substantial" in themselves, or which do not "substantially" enhance the value of the particular lot sold, may be disregarded. Thus, the section is ordinarily inapplica-

White Studio

Brady O. Bryson received his preparatory education at Western Maryland College (B.A. 1935) and his legal education at Columbia University (LL.B. 1938). He was admitted to the District of Columbia Bar in 1938 and to the Pennsylvania Bar in 1942. He has also been admitted to the Bar in New York and Maryland.

ble if the taxpayer builds a shopping center on the tract; but it probably remains applicable if he puts in minimum access roads.

In some circumstances "substantial" improvements in the nature of water and sewer facilities and roads, such as would otherwise disqualify the transaction, are nevertheless permitted. For this special rule (added as a Senate floor amendment) to apply the lot, the value of which was substantially increased as a result of the improvements, must have been held for ten years or more; it must be shown to have been unmarketable "at the prevailing local price for similar building sites" without such improvements; and the taxpayer must elect to forgo adding the capital expenditures representing the cost of such improvements to his basis for the property.

Under the new provision all gain in the year in which the sixth lot is sold from the tract, and in subsequent years, is treated as ordinary income to the extent of 5 per cent of the selling price, less the expenses of the sale. Thus, the individual may sell up to five lots in any one tract on a capital gain basis; but beyond that, if he does his own selling, he will have ordinary income equivalent to a 5 per cent sales commission. If he waits five years after any sale, he can make a fresh start in counting his sales.

Section 1237 was recently amended to apply also to corporations subdividing real estate, where no shareholder is a dealer in real estate. (Pub. L. No. 495, 84th Cong., 2d Sess., April 27, 1956).

2. *Patents.* Prior to the enactment of the new Code, inventors had achieved quite a favorable tax position without any specific assistance from Congress. Patents were considered capital assets in the hands of the inventor unless he was engaged in the business of selling them, and under the decisions it is doubtful that even Thomas A. Edison would have been considered so engaged. Moreover, the granting of an exclusive license to "make, use and sell" was considered by the courts to be a sale even though it contained cancellation clauses, and even though the consideration took the form of royalties over the life of the patent. See, *e.g., Kronner* v. *U.S.,* 110 F. Supp. 730 (Ct. Cls. 1953); *Commissioner* v. *Celanese Corp.,* 140 F. 2d 339 (D.C. Cir., 1944); *Commissioner* v. *Hopkinson,* 126 F. 2d 406 (2d Cir. 1942); *Edward C. Myers,* 6 T.C. 258 (1946) (NA).

However, the Internal Revenue Service had not accepted these results. In Mimeograph 6490 (1950-1 C.B.9) the position was taken that a transaction is a license, not a sale, if the consideration is based on the use of the patent or is payable over a period generally coterminous with such use.

With the declared intention of stimulating invention, Congress made the tax position of the inventor secure by adopting, in Section 1235 of the 1954 Code, rules assuring long-term capital gain treatment on any transfer of an invention or an undivided interest in it. The new inventor is in the business of selling his inventions and even though he has held the particular invention for less than six months. However, the following conditions must be fulfilled:

(1) All substantial rights to a patent, or an undivided interest therein which includes a part of *all* such rights, must be transferred. Thus, a fractional interest in the entire patent will qualify, whereas a license restricted to an area less than the geographical scope of the patent will not. The patent need not have issued or have been applied for; if not, the transfer may be of the rights in the prospective patent. The transfer may be in the form of a "license" or any other form, so long as "substantially all rights of the owner in the patent property have been released to the transferee"; and rights "not inconsistent with the passage of ownership" such as security interests, forfeiture rights upon non-performance (but not rights of revocation at will), etc. may be retained. See Sen. Rep. No. 1622, 83d Cong., 2d Sess. 440 (1954).

(2) The transfer must be for a consideration, *i.e.,* it cannot be by way of gift, inheritance or devise. It is immaterial that the consideration is payable over the period of, or is contingent on, the use of the patent by the transferee.

(3) The taxpayer must be a "holder", within the section. This favored group includes the individual or several individuals whose personal efforts resulted in the invention, and other individuals who purchased for money or money's worth their interests from the inventor prior to *actual* (not "constructive") reduction of the invention to practice. The purpose, of course, is to encourage inventors and those who finance them. Note that corporations and subsequent transferees are not included. Specifically excluded also are the inventor's employer and persons (other than brothers and sisters) so related to the inventor that losses on transactions between them would be disallowed under Section 267. (Sales *to* such related persons are also excluded from Section 1235). It is assumed in this situation that an actual employer-employee situation must exist.

The benefits of the section extend to payments made after the application of the 1954 Code even though the transfer was in a prior year.

Where the section applies, the transferee is treated as a purchaser, so that "royalties" and other payments represent the cost of the patent rights and deductions must be taken in the form of depreciation or amortization allowances rather than expense items.

3. *Short sales and options.* Some modifications in the provisions of Sections 117 (g) (1) and 117 (l) of the 1939 Code were made in re-enacting the rules governing short sales. These prior rules, in essence, treated short sales as resulting in capital gains or losses sustained on the property used to cover the sales. This was true in all cases except where the seller at the time of the

short sale already owned property suitable for coverage purposes ("substantially identical" property) which had been held for not more than six months, or where the seller acquired such property before the sale was covered. In the latter cases gain on the sale was treated as short-term gain, and the "substantially identical" property did not acquire any age for holding period purposes until the short sale was closed or the property was disposed of, whichever first occurred. The basic policy, of course, was to prevent the "pegging" of unrealized short-term gains by selling short and covering only after the property used to cover had aged six months or more.

The new Code continues these rules in Section 1233 with some important changes. The transaction results in capital gain or loss only if the property used to cover is a capital asset. Previously *all* short sales produced capital gains or losses. There are new rules relating to the tax treatment of "puts", which are treated as short sales unless the covering property is acquired on the same day, is identified with the "put", and is used to cover if the "put" is exercised.

Section 1234 provides that gain or loss in option transactions shall be capital gain or loss if the property subject to the option is or could be a capital asset in the hands of the taxpayer. Also, loss from failure to exercise an option held for more than six months will now be given long term instead of short term treatment, thus effecting the same result whether an option is sold or exercised.

4. *Business receivables.* One of the imperfections in the tax law under the 1939 Code lay in the tax treatment of sales of business receivables. In order to acquire working capital, businesses often sell their accounts or notes receivable from customers. The full amount of the account or note having been taken into income on the accrual basis, the subsequent sale at a discount results in a loss. Under the 1939 Code, since the seller was not a dealer in notes, the sale resulted in a capital loss.

The 1954 Code repairs this defect by excluding from the definition of "capital asset" "accounts or notes receivable acquired in the ordinary course of trade or business for services rendered or from the sale of" inventory or other property held for sale to customers. (Section 1221 (4). Hence the sale of such business receivables now results in ordinary gain or loss. While intended as a relief measure, it has also narrowed the area in which future income may be treated as capital gain.

5. *Original issue discount.* The new Code closes a loophole with respect to the sale, exchange or retirement of bonds in registered form or with coupons attached which were issued originally at a discount. Upon sale or retirement, a portion of the proceeds ordinarily represents, in substance, interest for the period during which the taxpayer has held the bonds. However, under the 1939 Code, there was nothing expressly precluding the normal capital gain treatment from applying to the gain on the sale or retirement; and while the Treasury sought to tax the spread attributable to the discount as ordinary income under general tax principles, there was uncertainty under the decisions as to its right to do so. *Commissioner* v. *Caulkins,* 144 F. 2d 482 (6th Cir., 1944).

Section 1232 of the 1954 Code eliminates the uncertainty together with nearly all of the possibility of enjoying this unwarranted tax advantage. The section provides that on a sale, exchange or retirement, a portion of any gain equal to the fractional part of the original issue discount attributable to the period during which the taxpayer held the bond shall be taxed as gain from the sale of a non-capital asset.

6. *Bonds purchased with excessive coupons detached.* A fairly well-publicized tax "gimmick" practiced by some high bracket taxpayers under the 1939 Code was the purchase of coupon bonds with an excess number of coupons detached. The purchase was made at a discount, of course, from a lower-bracket taxpayer. As the coupons matured, the seller paid ordinary income tax; and when they had matured, the purchaser re-sold at a gain which resulted largely, if not entirely, from the expiration of the coupon periods. The gain, of course, was reported as capital gain although in substance it amounted to interest income.

The 1954 Code put an end to this device by providing in Section 1232-(c) that upon a sale of bonds previously purchased with coupons detached, a portion of the gain equal to the difference between the price paid for the bonds and the market value of like bonds with coupons attached is taxable as an ordinary gain.

7. *Lease or franchise cancellation.* Under Section 1241, amounts received by a lessee (not by the lessor) for the cancellation of a lease, or by a distributor (not by the supplier) for the cancellation of a distributor's agreement, if there is a substantial capital investment, are treated as received in a capital transaction. The mode of payment is apparently immaterial, whether in a lump sum or in installments. Similar results had been reached in the cases, prior to the addition of this provision to the 1954 Code. See *Commissioner* v. *McCue Bros. & Drummond, Inc.,* 210 F. 2d 752 (2d Cir. 1954). But *cf. Commissioner* v. *Starr Bros., Inc.,* 204 F. 2d 673 (2d Cir. 1953).

Only the general rules affecting gains and losses on property dispositions governed by Subchapters O and P of the Internal Revenue Code have been described. There are many other provisions governing specialized situations, such as corporate distributions, reorganizations and liquidations, employee retirement plans, stock options, partnership formations and terminations, trust distributions, etc., which may produce or affect the tax status of capital or ordinary gains and losses.

Self-Incrimination:

Is the Privilege an Anachronism?

by **Richard C. Baker** · ***Professor at Harding College (Searcy, Arkansas)***

■ **The use of the privilege against self-incrimination by suspected Communists and others whose activities may involve disloyalty to the United States has aroused great interest in the history of this constitutional provision and in the problems raised by its invocation. Professor Baker argues that the privilege is of much more recent vintage than many of our other constitutional rights and that its use should be curtailed and limited in the interests of the welfare of society.**

■ A provision found in the basic laws of most of our states[1] and also in the Fifth Amendment to the Federal Constitution reads substantially as follows: "No person . . . shall be compelled in any criminal case to be a witness against himself." As interpreted by the courts, the immunity provided here means that no one, whether he is a defendant or a mere witness, can be forced in any judicial, legislative or administrative inquiry to give evidence which might result in his criminal prosecution. A corollary to this general proposition is that the failure of a defendant to testify in his own defense is not to be construed as indicative of his guilt.

The origin of this well-known constitutional privilege is somewhat veiled in obscurity. A few of the historically minded have it emerging as early as 1215 in Magna Charta, but a majority of them fix its birth several centuries later. The most likely date would seem to fall close to the turn of the seventeenth century, when the immunity began appearing in the English courts. At first, many of these tribunals were reluctant to allow it to be invoked, but as the century wore on, it gradually came into common use, and by the year 1700 or thereabouts was accepted more or less as a permanent fixture in the jurisprudence of England.

During this period the exemption rested on a judicial rather than a legislative basis. It owed its creation and development entirely to the courts, and not to Parliament. The English lawmakers apparently were unconcerned about the privilege as is evidenced by the fact that they completely ignored it on two momentous occasions. They neglected to mention it in both the Petition of Right of 1629 and the Bill of Rights of 1689. However, they did indicate each time their anxiety over certain other fundamental rights by demanding in the first of these documents the observance of such guarantees as due process of law, trial by jury and habeas corpus, and by condemning in the second the practices of requiring excessive bail, levying immoderate fines, inflicting cruel punishments, and using "partial, corrupt, and unqualified jurors".[2]

Parliament, for the most part, has refrained down through the years from tampering with this judge-made privilege, though, of course, it has always had ample authority to dispose of it in any way it might see fit. It has made one notable exception to this policy of forbearance, and this has been in connection with bankruptcy matters. Through a series of enactments beginning as far back as 1603 and culminating in a law passed in 1883, it has required insolvents to disclose their financial affairs regardless of any criminal consequences.[3]

The immunity was found also in our seventeenth- and eighteenth-century colonies. But its acceptance there at first was no more universal than it was in England. The rulers of Massachusetts Bay, for example, were indifferent toward it, to say the least, at the time of the famous Anne Hutchinson trial of 1637. In that case, they allowed the accused to be summoned before the court and there be subjected to a severe cross-examination, at the close of which she was banished from the colony.[4]

1. New Jersey, Iowa and California have restricted the scope of the immunity.

2. Taswell-Langmead, ENGLISH CONSTITUTIONAL HISTORY, pages 107, 502, 572, 599; *Twining* v. *New Jersey*, 211 U.S. 78, 101-102.

3. 8 WIGMORE ON EVIDENCE (3d ed.) §§2260, 2281, footnote 11, 2282.

4. Winthrop's JOURNAL, 1630-1649, edited by James Kendell Hosmer, vol. 1, pages 243 *ff.*; *Twining* v. *New Jersey*, *op. cit.*, page 104.

In a similar frame of mind were the colonial fathers, who, more than a century later, wrote the Stamp Act Declaration of 1765, the Declaration of Rights of the Continental Congress of 1774, and the Declaration of Independence of 1776. They showed their lack of concern for the privilege by omitting it from those documents, while, at the same time, making sure that certain others were included.[5]

The exemption fared somewhat better in the revolutionary and constitutional periods, though it was still being neglected by many important people. The framers of eight of the original state constitutions and the creators of the Federal Constitution found no place for it in their respective instruments, despite the fact that they too saw fit to insert numerous other guarantees. Among those incorporated by the former were trial by jury, grand jury indictment, habeas corpus, right to counsel and compulsory process; those embodied by the latter were trial by jury, habeas corpus, protection against *ex post facto* laws and bills of attainder, and certain ones associated peculiarly with the law of treason. Connecticut failed to write the privilege into its fundamental law until 1818, New York until 1821, Rhode Island 1842, and both South Carolina and Georgia until after the Civil War. New Jersey has never done so.[6] It is true that the new states entering the union after 1789 made provision for the guarantee, but they did so because they usually copied almost *in toto* the federal bill of rights. When the exemption was added to the national Constitution in 1791 as part of the Bill of Rights, it was then lumped in with about fourteen other liberties.

Two other important groups, which also appeared to have had little solicitude about the exemption, were a majority of the delegates to the thirteen constitutional ratifying conventions, and the authors of the Northwest Ordinance of 1787. The representatives to nine of these conventions, though suggesting in their resolutions of ratification that certain privileges be included in the Federal Constitution as amendments, did not propose that this particular one be among them. The men who wrote the Northwest Ordinance, while taking great pains to put into that legislation such civil liberties as habeas corpus, trial by jury, reasonable bail, just and humane punishments, and adequate compensation for property taken for a public use, avoided all reference to the self-incrimination exemption. In the same general category with these people should be listed Thomas Jefferson and Richard Henry Lee,[7] neither of whom ever tired of boasting about his devotion to civil liberty. These two protested vigorously against the omission from the Constitution of freedom of religion, freedom of the press, the habeas corpus guarantee, trial by jury, and the protection against unreasonable searches and seizures, but were as silent as the grave about the exclusion of the self-incrimination privilege.

The European View . . . *An Illogical Privilege*

It should be stated here parenthetically that this immunity has never gained favor on the European continent, not even among those countries which pride themselves on their democratic and liberal proclivities. It has never been allowed to become a part of their jurisprudence or court procedures. To the peoples of those nations, the notion that the principal character in a criminal investigation should be permitted to remain entirely mute while the authorities expend an endless amount of time, money and energy seeking the solution of a crime, an effort which frequently proves futile, seems highly illogical. Yet despite the denial in these lands of this basic right, as we choose to call it, who will say that the systems of justice prevailing in France, Holland, Sweden or West Germany are inferior to ours, or any less fair, just or humane?

It is quite evident that the exemption from self-incrimination is not as deeply rooted in our history as are some of the other liberties. It postdates them by a number of generations. It finally became fastened in our jurisprudence during an era when our Revolutionary fathers had acquired a hypersensitivity about governmental tyranny. Their reaction stemmed primarily from their unfortunate experiences with the English king and his colonial governors and judges. They often had felt the heavy hand of oppression from these sources, and ultimately came to see in each act of government an encroachment upon personal freedom. Any such inroads they were ready to combat with every available legal weapon, including the self-incrimination immunity. Many of these infringements were unquestionably real, but others were no doubt somewhat fancied and exaggerated.

During most of the nineteenth and the earlier part of the twentieth centuries the concern over civil liberties abated considerably. The previous agitation, with all of its emotional implications, which had developed around them, had well-nigh ceased. The American people had learned to take these liberties in their stride and demand only that they be given a sensible and rational application. They were satisfied if a reasonable balance was struck between personal freedom, on the one hand, and the public security, peace and good order, on the other. However, whenever a serious conflict arose between the two, the public usually insisted that the issue be resolved in favor of the latter.[8]

Recently, a sizable vocal group has once again become highly exercised about civil rights, and gives them precedence over all other matters. In fact, with its members, such rights have assumed almost the proportions

5. *Twining* v. *New Jersey*, *op. cit.*, page 108.
6. The 1776 Constitution of Maryland declared that no one should be required to give evidence against himself, but left it to the legislature to determine the scope of the application of the immunity. New Hampshire in 1784 and Delaware in 1792 incorporated the exemption into their respective constitutions.
7. THE PEOPLE SHALL JUDGE, by Staff of Social Sciences I in the College of the University of Chicago, University of Chicago Press, 1950. Volume 1, pages 322, 326, 327.
8. This might not be true today, at least not on the judicial level. See *Terminiello* v. *Chicago*, 337 U.S. 1, particularly the dissenting opinions. See also the dissent in *Winters* v. *New York*, 333 U.S. 507.

of a fetish, an obsession, a mania; they have become an overwhelming, an all-consuming passion. These people are as disquieted about invasions of personal freedom as some of our ultra-conservative brethren are regarding the dissemination of Communistic propaganda. The former find in the action of each government official an attack upon the Bill of Rights, just as the latter see in such action an effort to spread the Marxian philosophy.

There were several factors which contributed to the emergence and development of the self-incrimination privilege. One of these was the frequent employment of torture and duress by public authorities to extort incriminating evidence from an accused. This usage continued in some areas as late as the eighteenth century. Another factor was the practice of browbeating or duping prisoners in the dock into making spurious confessions. Protests against this method availed little because the judge, prosecutor and jury were all appointees of the king, who usually was anxious for a conviction. The jurors, to be sure, were not direct selectees of the sovereign, but they were handpicked by the sheriff, who owed his office to the ruler. A third consideration involved the denial to the defendant both of compulsory process to obtain his witnesses, and of the right of counsel. Without these, the preparation of an adequate defense was virtually impossible. A fourth was the refusal to permit a defendant to take the witness stand in his own behalf, the rationale here being that since the accused was an interested party, his testimony would have little or no probative value.[9] With the defendant thus being unable to exonerate himself through his own evidence, even the most callous souls were ready to concede that he should not then be forced to disclose information which might lead to his conviction.

None of these factors, of course, any longer exists. When a person is now accused of a crime, he is tried before a judge who usually is elected by popular vote and by a jury chosen by lot and consisting of twelve citizens answerable only to their own consciences. The trial itself is conducted in a goldfish bowl, where all of its details can be viewed by press and public alike. Moreover, the accused is defended either by his own counsel or by one assigned to him by the court, and he is allowed compulsory process. Then too, there is the added protection of one or two appeals to higher courts where any errors prejudicial to the defendant may be corrected.

But, despite these safeguards, it is argued, a frightened but innocent defendant, under relentless cross-examination by a shrewd but not too scrupulous prosecutor, might become so befuddled and bewildered that he would convict himself out of his own mouth. Such a danger, however, is not as serious as it might seem, for it probably can be averted through a rather simple expedient. This expedient consists of denying the state's attorney the privilege of personal cross-examination, and compelling him to use the court for questioning the accused. All his queries would have to be asked through the presiding judge, who could refuse to put those he deemed unfair to the defendant. In this way all insinuations and innuendoes, all histrionics and melodramatics, and all bullying tactics, which at times have featured the interrogation of an accused would be eliminated.

The Defendant's Rights . . . *A Duty To Serve Society*

If the rights of the defendant are thus protected, there is little reason why he should be excused from testifying, even though by so doing he might convict himself. After all, he does owe the society which has served and protected him some obligations. One of these is to help it preserve both public order and the safety of its people. Another is to aid it in safeguarding the innocent. The accused is, in many cases, the sole person who has the complete answer to a crime; in others, he may not be able to state who committed an offense, but can say positively who did not. If he speaks, he may save the public authorities from wandering up many a blind alley in search of a phantom culprit, or, what is more important, prevent them from convicting a guiltless man. It seems absurd that even when the police discover an individual standing over a corpse with a smoking revolver in his hand, the state is precluded from forcing him to disclose the cause of his predicament.

Richard C. Baker has taught political science at Hastings College, Allegheny College, the University of Pittsburgh, Cornell University, the City College of New York and Drake University. He is a member of the New York Bar and has practiced law in New York state. He is the author of several articles dealing with legal and constitutional subjects.

The complaint is made also that the elimination of the self-incrimination exemption would vitiate one of the most cherished privileges known to Anglo-Saxon jurisprudence, namely, the presumption of innocence until guilt is proved. It is alleged that without this exemption the defendant would be required to exculpate himself. Nothing, however, is farther from the truth. In most states, even if the immunity did not exist, the prosecution would still be called upon to bear the burden of proof in a

9. Frank Irvine, *The Third Degree and the Privilege Against Self-incrimination*, 13 CORNELL LAW QUARTERLY 211 (1927-1928). As late as 1869, a defendant in New York state had no right to take the stand in his own defense. See *People* v. *Rakiec*, 289 N.Y. 306, 45 N.E. 2d 812. See also Laws of New York, 1869, c. 678.

criminal proceeding, and also to convince the jury of the defendant's guilt beyond a reasonable doubt. The absence of the immunity might make it easier for the state to prove certain facts, but would not in itself shift to the accused the onus of establishing his innocence. In other words, the burden might be a little less burdensome but it would still rest on the state. There is nothing morally, ethically, legally or constitutionally reprehensible about making the prosecutor's task of obtaining a conviction less difficult, if it can be done without offending man's sense of fair play. Not infrequently a legislature will allow evidence to be used against one defendant, which previously it has held to be inadmissible against another in a similar case.

The presumption of innocence is usually of a statutory nature, and therefore can be modified or even abolished by the legislature. And, in fact, in some of our jurisdictions, where the immunity prevails, the lawmakers have modified court procedures so as to place the burden of proof on the defendant to a limited extent. New York, for example demands that where an accused intends to use the defense of justifiable or excusable homicide in a murder or manslaughter case, he must come forward with positive proof of his vindication. He cannot merely plead his justification and then compel the state to disprove it without his adducing any evidence of his own.[10] The state also provides for certain presumptions of illegality, which it requires the defendant to meet. The law asserts that the presence of a machine gun in a house creates the presumption of illegal possession by the occupier,[11] and it makes the possession or use by a person of a false weight or measure presumptive evidence that such person knew the falsity of the instrument.[12] New York insists too that a defendant expecting to plead an alibi must furnish the district attorney with a list of his alibi witnesses in advance of the trial. This rule prevents the accused from springing surprise evidence on the prosecutor, which he cannot challenge effectively because of the time element involved.[13] A number of jurisdictions go so far as to require a defendant who pleads insanity to prove his derangement. He must do so by a fair preponderance of evidence.[14] All of the practices mentioned here have been contested in the courts, usually as being offensive to the self-incrimination immunity, but they invariably have been upheld.

The claim is likewise advanced that the exemption from self-incrimination is linked inseparably with the protection against third degree police tactics, and that the maintenance of the first is absolutely essential to the preservation of the second. We must keep the former, it is asserted, lest we find ourselves subjected to the star-chamber procedures of sixteenth-century England or to the torture methods of Adolf Hitler. But this contention like the previous one has little or no foundation. While it is true that the self-incrimination immunity was instituted to protect those who made spurious confessions under duress, it is seldom invoked at present by such people. Rather, it is now employed principally by those who seek to avoid answering questions under no greater compulsion than that of being punished for contempt of a competent tribunal by a fine or short imprisonment. Third-degree victims today rely primarily on the due process clause and the unreasonable search and seizure guarantee as their refuge, and they actually would find themselves at no disadvantage if the self-incrimination privilege had never been invented.[15]

Let it be said here that under our system of justice no one should ever be compelled to speak unless legally subpoenaed to do so. This is true whether the party to be interrogated is a defendant, litigant or witness. Otherwise, people might be exposed to numerous kinds of illegal and unauthorized harassments. Moreover, evidence secured through the third-degree method should be barred completely from court, and those persons extracting it should be treated to swift civil and criminal penalties. Such punishment should be meted out even though no effort is made to use the evidence against the defendant.

Civil Actions . . .
Privilege Not Allowed

Although in most of our jurisdictions we allow the self-incrimination privilege to be invoked in criminal cases, we seldom, if ever, permit it to be used in civil actions. "Liberty of person", regardless of its nature or extent, is a serious matter with us, and we throw every protection around it. This is true even though the liberty may be connected with an offense carrying only a ten dollar fine. But when "liberty of property" is at stake, irrespective of the amount of property or other considerations involved, we assume a much less solicitous attitude. In such cases, we require both litigant and witness to testify despite the adverse civil effects of the testimony. The evidence may cause either of these to lose his wealth, position, reputation, and perhaps family, but such tragic consequences are held to be of no interest to the law.

But many people treasure their property and their reputation as much as they do their personal liberty. In fact, in earlier times, our forefathers often prized their property above their liberty. History records that frequently they would die before their cabin doors defending their tiny holdings against all who came to take it, be they Indians, landgrabbers or officers of the law, but would protest only mildly, if at

(*Continued on page 686*)

10. *People* v. *Stern*, 201 App. Div. 687, 195 N.Y.S. 348; *People* v. *Schreyer*, 42 N.Y. 1.
11. Penal Law (N.Y.), §§1897 sub.1a, 1898a.
12. Penal Law (N.Y.), §2411a.
13. Criminal Code (N.Y.), §295-1. See *People* v. *Schade*, 161 Misc. 212, 292 N.Y. 612.
14. 9 WIGMORE, §2501, (3d edition). See *State* v. *Lawrence*, 57 Me. 574; *State* v. *Quigley*, 26 R.I., 28 Atl. 935; *Grammer* v. *State*, 239 Ala. 633, 196 So. 268; *People* v. *French*, 12 Cal. 2d 720, 87 Pac. 2d 1014; *Barker* v. *State*, 188 Ga. 332, 4 S.E. 2d 31; *State* v. *Lynch*, 139 N.J. 253, 32 A. 2d 183; *State* v. *Swink*, 229 N.C. 123, 47 S.E. 2d 852; *State* v. *Grieco*, 194 Ore. 253, 195 P. 2d 183; *Commonwealth* v. *Carluccetti*, 369 Pa. 190, 85 A. 2d 391. See also Colorado Stat., 1951 c. 144. New York's position on the question is somewhat uncertain. See *People* v. *McCann*, 16 N.Y. 58; *People* v. *Walker*, 32 N.Y. 147; *People* v. *Nino*, 149 N.Y. 317; *People* v. *Irwin*, 166 Misc. 751.
15. 3 WIGMORE, §832 (3d ed.)

A New Legislative Program of the Association

In this statement, Ashley Sellers, the Chairman of the Association's Special Committee on Legal Services and Procedure, explains the new legislative program recently adopted by the Association in the field of legal services and procedure, and points out that every member of the Association has an opportunity to participate in this important work.

Plans have now been made to secure the approval of the Congress of the new legislative program recently adopted by the Association in the field of legal services and procedure. Due to the importance of this program, it is desirable for every member of the Association to be acquainted with the general aims and purposes of the program and with the organization and procedure whereby it is to be effectuated. At its Midyear Meeting, the House of Delegates adopted recommendations which call for the enactment of a new Code of Federal Administrative Procedure to replace the present Administrative Procedure Act; the creation of a new Office of Administrative Procedure and Legal Services which, among other things, will administer new laws dealing with hearing commissioners and with the performance of legal services within the Federal Government; the establishment of one or more new courts which will perform judicial functions now being performed by certain administrative agencies; the enactment of comprehensive legislation dealing with the right of lawyers and others to represent persons and organizations before federal agencies; and the reorganization of the performance of legal services within the Department of Defense.

Following the Midyear Meeting, the Board of Governors assigned to the Special Committee on Legal Services and Procedure responsibility for drafting and submitting to the Congress proposed legislation on these subjects. The Board specified that the authority conferred upon the Special Committee should be exercised by a Steering Committee of not more than six of its members, to be designated by the Chairman, with the remaining members to act in an advisory capacity. The Special Committee was also authorized by the Board of Governors to delegate to other Committees and Sections of the Association responsibility for carrying out specific tasks in connection with this program.

At a recent meeting of the Special Committee, five Advisory Groups were established. Each Advisory Group is under the chairmanship of a member of the Special Committee. All Committees and Sections of the Association have been requested to designate representatives to serve upon these Advisory Groups to the extent of their interest in the different subjects. Following is a list of the Advisory Groups, with a reference to the subject matter of each, the name and address of each chairman, and the Committees and Sections of the Association which are represented thereon.

Advisory Group on Resolution 2 (Code of Federal Administrative Procedure):
- Rufus G. Poole, Chairman
- 1625 K Street, N. W.
- Washington 6, D. C.
- Representatives from:
  - Section of Administrative Law
  - Section of Judicial Administration
  - Section of Public Utility Law

Advisory Group on Resolution 3 (Office of Administrative Procedure and Service):
- Donald C. Beelar, Chairman
- World Center Building
- Washington 6, D. C.
- Representatives from:
  - Committee on Civil Service
  - Section of Administrative Law
  - Section of Labor Relations Law
  - Section of Taxation
  - Junior Bar Conference
  - Federal Bar Association

Advisory Group on Resolution 4 and 4.1:
- Robert M. Benjamin, Chairman
- 1 East 44th Street
- New York 17, N. Y.
- Representatives from:
  - Committee on Jurisprudence and Law Reform
  - Committee on Customs Law
  - Section of Administrative Law
  - Section of Judicial Administration
  - Section of Antitrust Law
  - Section of Labor Relations Law
  - Section of Taxation
  - Section of Public Utility Law

Advisory Group on Resolution 5 (Representation):
- Thomas N. Tarleau, Chairman
- 15 Broad Street
- New York 5, N. Y.
- Representatives from:
  - Committee on Professional Ethics and Grievances
  - Committee on Professional Relations
  - Committee on Unauthorized Practice of the Law
  - Section of Administrative Law
  - Junior Bar Conference

Advisory Group on Resolution 6 (Defense Department):
- Ralph G. Boyd, Chairman
- 75 Federal Street
- Boston 10, Massachusetts
- Representatives from:
  - Committee on Legal Assistance for Servicemen
  - Committee on Military Justice
  - Junior Bar Conference

Each Advisory Group was directed to submit proposed legislation to the Special Committee on Legal Services and Procedure on or before November 1, 1956. One of the main objects of the Special Committee in adopting the organization and procedure just described is to make it possible to utilize the technical and other services of every member of the Association. To the extent that other Committees and Sections are represented on the Advisory Groups, members of those Committees and Sections may communicate their ideas to their representatives on these groups; otherwise, they may communicate their ideas directly to the chairmen of the different Advisory Groups.

Activities of Sections

SECTION OF ANTITRUST LAW

■ The Section of Antitrust Law will present a program at the Dallas annual meeting on Tuesday and Wednesday mornings, August 28 and 29, at the Baker Hotel. The Section's luncheon will be held on August 29 at the same hotel.

The theme of the program will be the corporate family parents, subsidiaries, affiliates and joint venturers.

Former Governor Dan Moody will deliver a paper on state antitrust enforcement, with emphasis on Texas.

SECTION OF LABOR RELATIONS LAW

■ The Section held an interesting meeting at Hartford, Connecticut, Sunday, April 16, in connection with the Northeastern Regional Meeting of the American Bar Association. The meeting was addressed by Kenneth C. McGuiness, Associate General Counsel of the National Labor Relations Board, following which an informative panel discussion was held on the subject of the proposed Uniform Arbitration Law. Professor Archibald Cox, of the Harvard Law School, acted as moderator, and the following members participated in the panel discussion: J. Nobel Braden, Executive Vice President of the American Arbitration Association, New York City; William J. Larkin, of Waterbury, Connecticut; Saul Wallen, of Boston, Massachusetts; Benjamin Wyle, General Counsel of the Textile Workers Union of America, New York City; Norman Zolot, Counsel of the Connecticut Federation of Labor, Bridgeport, Connecticut; Burton A. Zorn, of New York City.

SECTION OF ADMINISTRATIVE LAW

■ During May, the Section of Administrative Law engaged in many activities before Congress. On May 8 and 9, the Moss Subcommittee on Government Information of the House Government Operations Committee held a two-day panel discussion of the legal problems involved in restrictions on information, both to the public and to Congress, from the Federal Government. Three of the four-member panel on May 8 were members of the Section: Hans A. Klagsbrunn, Council member; Professor Bernard Schwartz, editor of the *Administrative Law Bulletin;* and John B. Gage, chairman of the Section's Committee on Agriculture. Two of the four members of the panel on May 9 were Council members: Harold L. Russell and Professor Frank C. Newman. The panels discussed not only the withholding of information on a claim of privilege, but also the need for legislation which would clarify Congress' right to know and the people's right to know.

At this writing, hearings are scheduled to be held on May 22, 23 and 24 before a special subcommittee of the Rules Committee of the House of Representatives on H. R. 462, introduced on April 10, 1956, by the chairman of that committee, Howard W. Smith, of Virginia, at the request of the American Bar Association. H. R. 462 provides for the establishment of a new standing committee of the House of Representatives on Administrative Procedure and Practice, as advocated by a resolution proposed by the Section of Administrative Law and adopted by the Association at its Midwinter Meeting. See 42 A.B.A.J. 377.

This committee would have among other duties that of studying complaints concerning abuses of administrative authority and the need for legislative standards to limit the exercise of administrative discretion in areas of delegated power; studying procedures and practices of administrative agencies to determine whether such procedures and practices are in accordance with law, adequately protect public and private rights, avoid undue delay and unnecessary expense, and comport with the principles of fair play; and evaluating the effect of laws enacted to regulate procedures of administrative agencies. It would also have specific jurisdiction over the Administrative Procedure Act and any amendment thereto.

Witnesses scheduled to testify in support of the resolution include Rufus G. Poole, Chairman of the Section of Administrative Law; David F. Maxwell, President-nominee of the American Bar Association; David W. Peck, Presiding Justice of the Appellate Division of the Supreme Court, First Department, of New York; Cody Fowler and Robert G. Storey, Past Presidents of the American Bar Association; Dean E. Blythe Stason, Vice Chairman of the Section of Administrative Law; Charles Rhyne, Chairman-nominee of the House of Delegates; and Bernard Schwartz, Editor of the *Administrative Law Bulletin.*

At the conclusion of the hearings the Committee proposes to send prepared copies of the testimony to the chairmen of all the standing committees of the House of Representatives with the request that they furnish the Special Subcommittee (Representatives Bolling, Latham

and Smith) their views in writing on the resolution. After studying the testimony and the comments, the Special Subcommittee will then determine on further action.

SECTION OF MUNICIPAL LAW

■ The Section of Municipal Law has been directly concerned with developments in the field of metropolitan area government. At the last annual meeting, the chairman was instructed to take whatever steps were necessary to bring about coordination of the work with other organizations. These efforts resulted in a well-represented organization meeting held at Kellogg Center, Michigan State College. David M. Wood, Harold Shefelman and Jefferson B. Fordham represented the Municipal Law Section at this three-day intensive work meeting. As a result of these deliberations on the subject of metropolitan area government, there was formed a continuing committee on a national basis to be financed and staffed for a broad comprehensive study of the manifold problems of expanding metropolitan areas. The over-all committee representing all participating groups will be headed by Frank C. Moore, formerly Lieutenant Governor of the State of New York.

Jon Magnusson, Chairman of the Committee on Civil Rights and Civil Liberties (Local Government) reports that the Board of Directors of the Fund for the Republic has been interested in a study of civil liberties. He states that The Fund for the Republic has approved a cash grant to the University of Virginia for a summer research program on civil liberties sponsored by his committee.

These activities are in keeping with the broad scope and policy of the Section in fostering interprofessional studies of major problems to increase the effectiveness of bar association work.

Proposed Amendments to the Constitution and By-Laws

I

■ Notice is hereby given that Charles S. Rhyne, of Washington, D.C.; Stuart B. Campbell, of Wytheville, Virginia; Paul W. Lashly, of St. Louis, Missouri; John C. Satterfield, of Jackson, Mississippi; and Sylvester C. Smith, Jr., of Newark, New Jersey, members of the Association and members of the Committee on Rules and Calendar of the House of Delegates, have filed with the Secretary of the Association the following proposed amendments to the By-Laws of the Association:

(a) Amend Article X, Section 7, by striking out present sub-paragraph (d) and substituting therefor the following:

> (g) *Constitutional Law:* This Committee shall have jurisdiction of all questions arising under the Constitution of the United States, and all amendments thereto, affecting the rights, privileges and immunities of citizens. The Committee shall investigate substantial violations, actual or threatened, of the Bill of Rights, either by legislative or administrative action or otherwise, and shall take such steps as it may deem proper in defense of such rights in instances which might otherwise go undefended. When authorized by the House of Delegates or Board of Governors, it may (a) make public its conclusions with respect to such violation and (b) appear as amicus curiae or otherwise in cases in which vital issues of civil liberties are deemed to be involved. It shall disseminate information generally concerning constitutional liberties, to the end that violations thereof may be better recognized and prevented.

and by relettering present paragraphs (e), (f) and (g) to (d), (e) and (f) respectively.

(b) Amend the Constitution, Article VI, Section 3, by inserting in line 32 after the words "the House of Delegates" the words "and also former Secretaries and Treasurers of the Association with four years or more of service in such capacity", so that present lines 31 to 37 will read:

> Former Presidents of the American Bar Association, former Chairmen of the House of Delegates *and also former Secretaries and Treasurers of the Association with four years or more of service in such capacity*, who register in attendance at any annual meeting of the Association by 12 o'clock noon on the opening day thereof, the membership of such former officers becoming effective upon registration and continuing until the opening of the next annual meeting.

II

■ Notice is hereby given that Arthur VD. Chamberlain, of Rochester, New York, member of the American Bar Association, has filed with the Secretary of the Association the following proposed amendment to the Constitution of the Association:

Amend Article VI, Section 6 of the Constitution by eliminating therefrom the following sentence which now appears in lines 16 to 19:

> When a State Bar Association is entitled to additional delegates, the number of such additional State Bar Association delegates shall be reduced by the number of delegates elected by local Bar Associations within such State.

III

■ Notice is hereby given that Charles W. Pettengill, of Greenwich, Connecticut, member of the Association, has filed with the Secretary of the Association the following proposed amendment to the Constitution of the Association:

Amend Article VI, Section 4 by adding thereto the following sentence:

> No officer or member of the Board of Governors of the Association shall be eligible to serve as a State Delegate.

JOSEPH D. STECHER
Secretary

The Rt. Hon. Sir Reginald Edward Manningham-Buller, Attorney General of Great Britain.

Sir Edwin Savory Herbert, LL.B., K.B.E., President of the Law Society of England.

Two Distinguished Guests at the Dallas Meeting

■ The Right Honorable Sir Reginald Edward Manningham-Buller, the Attorney General of Great Britain, was educated at Eton and Magdalen College, Oxford. He was called to the Bar in 1927 and from 1927 to 1939 he practiced at the common law Bar in London.

With the coming of the war in 1939, Sir Reginald joined the Army. In 1943, he was elected Conservative Member of Parliament for Daventry (now called South Northamptonshire) and has represented that constituency since then.

Sir Reginald became a Queen's Counsel in 1940. After the general election of 1951, he was appointed Solicitor General in Sir Winston Churchill's Government. He was knighted by King George VI on receiving that appointment. He was appointed Attorney General in October, 1954.

He married the Lady Mary Lindsay, a daughter of the twenty-seventh Earl of Crawford and Balcarres, in 1930. They have a son and three daughters.

Sir Reginald is a descendant of another Attorney General—Sir Edward Coke, who held that office under Queen Elizabeth I, and later became Lord Chief Justice of England.

■ Sir Edwin Savory Herbert, LL.B., K.B.E., President of the Law Society of England, was born in 1899. Educated at Queen's College, Taunton, and the Law Society's Law School, he received his LL.B. at the University of London in 1919 and has been a solicitor since 1920.

He served at sea as a signalman in the R.N.V.R. from 1917 to 1919.

A member of the Council of the Law Society since 1935, he has served on various committees of the Law Society. He is President of the Arbitration and International Law Commission of the International Chamber of Commerce and was also President of the Alpine Club (1953-1955). He is Vice Chairman of the Mount Everest Foundation.

He holds the Medal for Merit from the United States Government and King Haakon's Liberty Cross.

Sir Edwin lists his recreations as mountaineering, skiing and sailing.

Summary of Program:

79th Annual Meeting, Dallas, Texas

■ A very interesting program is being arranged for members of the legal profession who will gather in Dallas for the 79th Annual Meeting of the American Bar Association, August 27-31.

Plans are being made for a "new members" breakfast, which will open the meeting on Monday morning, August 27. At the Assembly session Wednesday afternoon, August 29, the speakers will be The Right Honorable Sir Reginald Edward Manningham-Buller, Q.C., M.P., The Attorney General of Great Britain, and Paul P. Hutchison, Q.C., President of The Canadian Bar Association. Sir Edwin Savory Herbert, LL. B., incoming President of the Law Society of London, will address the Assembly on Thursday afternoon, August 30. In all, five Assembly sessions, including the Annual Dinner, will be held in the Ballroom of The Statler Hilton Hotel. The House of Delegates will meet daily in the Junior Ballroom of The Statler Hilton Hotel, from Monday, August 27, through Friday, August 31.

Outstanding programs are being arranged for Committees, Sections and a number of affiliated organizations. The seventeen Sections of the American Bar Association will all have special programs during the meeting. It is not possible to give the details of those meetings here and only a few of the events are mentioned.

The **Section of Administrative Law** will hold its meetings at The Statler Hilton. The Council will meet all day Saturday and Sunday, August 25 and 26, and general sessions of the Section will be held Monday afternoon, all day Tuesday and Wednesday morning, August 27, 28 and 29.

The **Section of Antitrust Law** will hold all of its meetings at The Baker Hotel, with general sessions scheduled for Tuesday morning and Wednesday morning, August 28 and 29. The subject to be discussed at both sessions is Corporate Parents, Subsidiaries, Affiliate and Joint Venturers. Tuesday morning will be devoted to the following topics and speakers: "Conspiracy" by James A. Sprunk, Toledo, Ohio; "Foreign Commerce" by Robert W. Graham, Seattle, Washington, and "Buying and Selling In and For the Corporate Family" by George Birrell, New York City. The topics and speakers scheduled for Wednesday morning include "Procedural Problems" by W. Glen Harlan, Atlanta, Georgia, and "The Corporate Family and Income Tax" by Vester T. Hughes, Jr., Dallas, Texas. In addition "State Antitrust Enforcement" will be discussed by Dan Moody, Austin, Texas, and "Developments in Antitrust During the Year Ending July, 1956" will be reviewed by Thomas E. Sunderland, Chicago, Illinois. A luncheon is scheduled for Wednesday noon, and the speaker will be John Ben Shepperd, Attorney General of Texas.

The **Section of Bar Activities**, meeting at The Statler Hilton, will hold general sessions on Monday afternoon, August 27, and Wednesday morning, August 29. The Committee on Award of Merit will meet all day Saturday and Sunday, August 25 and 26.

The **Section of Corporation, Banking and Business Law**, meeting at the Hotel Adolphus, will hold sessions on Monday afternoon and all day Tuesday, August 27 and 28. On Monday afternoon the Section will join with the Section of Patent, Trademark and Copyright Law in a Moot Appeal Argument. The judges who will preside over this court will be Raymond S. Wilkins, Chief Justice, Supreme Court of Massachusetts, Douglas Hudson, Fort Scott, Kansas, and Robert J. Farley, Dean, Law School, University of Mississippi. Representing the Corporation Section will be Carl Elbridge Newton, New York City, Carl F. Farbach, New York City, Edward P. Wright, Detroit, Walter J. Cummings, Jr., Chicago, Frederick W. Potter, Chicago, and Herman F. Selvin, Los Angeles. Representing the Patent Section will be Thomas Oren Arnold, Houston, Morgan L. Fitch, Jr., Chicago, Russell L. Law, Washington, D.C., James M. Naylor, San Francisco, Robert Bonynge, New York City, and Fulton B. Flick, Pittsburgh. The Tuesday morning session will be devoted to addresses on "Current Developments at the Securities and Exchange Commission" by J. Sinclair Armstrong, Chairman of the Commission; "The Project for a Uniform State Securities Act" by Louis Loss, Professor of Law, Harvard University; and "Modern Commercial Structures—Essential Documentation" by Warner H. Mendel, Vice President and Coun-

sel, Equitable Life Assurance Society of the United States. Tuesday afternoon will be devoted to a panel discussion on "Report of the New York Law Revision Commission on the Proposed Uniform Commercial Code—Areas of Agreement and Disagreement". Chairman of the panel will be Walter D. Malcolm, Chairman of the Section's Committee on Uniform Commercial Code, Boston. The panel members and their subjects include William A. Schnader, Philadelphia, "Areas of Approval of the Code by the New York Law Revision Commission"; Robert S. Pasley, Professor, Cornell Law School, "Points of Disagreement with Code in the Report of the New York Revision Commission"; Nicholas deB. Katzenbach, Professor, Yale Law School, "Should Common Law Rules of Conflict of Laws Be Modified in Commercial Law? Code, Yes; New York Law Revision Commission, No"; Henry Harfield, New York City, "Should the Code Include an Article on Letters of Credit? Code, Yes; New York Law Revision Commission, No".

The Division of Food, Drug and Cosmetic Law will hold a meeting in Florence Hall, Southern Methodist University, all day Tuesday, August 28. At the morning session there will be a discussion on the Federal Food, Drug and Cosmetic Act. The speakers include Bradshaw Mintener, Assistant Secretary of United States Department of Health, Education and Welfare; John L. Harvey, Commissioner of Food and Drugs, United States Department of Health, Education and Welfare; and William W. Goodrich, Assistant General Counsel, United States Department of Health, Education and Welfare. In addition there will be discussions on the Federal Meat Inspection Act, by A. R. Miller, Chief of Meat Inspection Branch in Agricultural Research Service, United States Department of Agriculture; Federal Narcotic Law, Alfred L. Tennyson, Chief of Legal Division of Bureau of Narcotics, United States Treasury Department; and Canadian Food and Drugs Act by C. A. Morrell, Director of Food and Drug Directorate, Canadian Department of National Health and Welfare. The speakers and subjects scheduled for Tuesday afternoon are: Albert H. Holland, M.D., Medical Director of Food and Drug Administration, United States Department of Health, Education and Welfare, "Current Drug Problems Under Federal Food, Drug and Cosmetic Act"; Charles S. Rhyne, Washington, D.C., "Some Reflections on Federal Food, Drug and Cosmetic Act"; Glenn G. Paxton, Chicago, "Food Additive Amendment of Federal Food, Drug and Cosmetic Act"; Arthur C. O'Meara, Chicago, "Life in a Weights and Measures Jungle"; Edwin L. Harding, Battle Creek, Michigan, "Commemoration of 50th Anniversary of Basic National Pure Food and Drug Laws and Its Significance to Food Industry"; and Elwyn L. Cady, Jr., Kansas City, Missouri, "Science of Proof Under Food, Drug and Cosmetic Law".

The **Section of Criminal Law** is scheduled to hold its meetings in the Auditorium of the Dallas Public Library, except the Tuesday morning session, which will be held at the Federal Correctional Institution, Seagoville, Texas. General sessions will be held Monday afternoon, all day Tuesday and Wednesday, morning, August 27, 28 and 29. The Monday afternoon session will include an address by William F. Tompkins, Assistant Attorney General, Internal Security Division, United States Department of Justice, "An Appraisal of Federal Loyalty-Security Procedures". On Tuesday morning, the subject will be "Treatment of the Convicted Offender—Rehabilitation". James V. Bennet, Vice Chairman of the Section, Warden Gollaher and other members of the Seagoville staff will conduct a tour of the institution, and will demonstrate the interview and classification procedures used to guide inmates in this unique "open" correctional institution. Luncheon will be served and special bus transportation from Dallas and return in time for the afternoon meeting will be provided. The Tuesday afternoon session will be held jointly with the National Probation and Parole Association. Addresses will be given on "Sentencing Those Convicted of Misdemeanors", by Thomas Herlihy, Jr., Chief Judge, Municipal Court, Wilmington, Delaware, and "Treatment of the Incorrigible Offender" (speakers to be announced). The Wednesday morning session will be devoted to the subject "Are the Courts Handcuffing the Police?" This will be a panel discussion of current developments in the fields of search and seizure, the law of arrest, discovery, privilege, etc., in their relation to the problems of law enforcement officers. Participants will include a defense lawyer, a prosecutor, a police officer, a judge and perhaps a member of the public from some non-legal calling.

All activities of the **Section of Insurance Law** will be held at The Baker Hotel, with the exception of the Wednesday morning, August 29, general session, which is scheduled for the Southwestern Legal Foundation Auditorium at Southern Methodist University. The meeting will open with a Section breakfast on Monday morning, August 27, at which R. Dean Moorhead, of Austin, Texas, will be the speaker. Honorable Frank G. Clement, Governor of the State of Tennessee, will be the guest speaker at the Monday noon luncheon. Immediately following the luncheon, general sessions will begin. At this session a medico-legal panel discussion will be presented and the participants will be Truman B. Rucker, Tulsa, Oklahoma, and Newton Gresham, Houston, Texas, legal experts; J. Grafton Love, M.D., Chairman, Section of Neurologic Surgery, Mayo Clinic, and H. H. Young, M.D., Chairman, Section of Orthopedics, Mayo Clinic, medical experts. Some of the subjects and speakers for Tuesday, August 28, include "Airport Operators' Liability", by William A. Hillier, of Chicago; "Warsaw Convention", by

George A. Whitehead, New York City; "Rights of Owner, Contractor, Surety, Government, Assignee Bank and Trustee in Bankruptcy in Unpaid Contract Funds", by R. Emmett Kerrigan of New Orleans; "The Automobile Liability Policy Today", by Norman E. Risjord, Kansas City, Missouri; "What's New in the Fire Insurance Business", by Harry F. Perlet, Jr., of New York City; and "Reinsurance Reviewed", by David L. Tressler, Chicago. On Wednesday morning, Wayne E. Stichter, of Toledo, Ohio, will conduct a trial panel. (Subject and speakers to be announced). Various committee breakfast meetings have been scheduled for Tuesday and Wednesday mornings. A reception and dinner dance will be held Tuesday evening.

The **Section of International and Comparative Law,** meeting at the Hotel Adolphus, will hold general sessions on Tuesday, August 28, following the traditional joint breakfast of the Comparative Law Division and the American Foreign Law Association. Whitney R. Harris, Dallas, Texas, will preside and Joseph W. Bingham, Professor Emeritus, Stanford University School of Law, will speak on "Problems Involved in Territorial Waters". The annual joint luncheon with the Junior Bar Conference is scheduled for Tuesday noon. Victor C. Folsom, Chairman of the Section, and Robert G. Storey, Jr., Chairman of the Conference, will preside jointly. Tuesday evening The Inter-American Bar Association in co-operation with the Committees on Relations with International Bar Organizations and on Co-operation with the Inter-American Bar Association of this Section will sponsor a reception in honor of distinguished foreign guests.

The general sessions of the **Section of Judicial Administration,** on Monday afternoon, and all day Tuesday, August 27 and 28, will be held in the Auditorium of the Republic National Bank Building. At the Monday afternoon session the work of the state committees and their accomplishments in the promotion of the Minimum Standards of Judicial Administration will be discussed. The Tuesday morning session will be devoted to "Impartial Medical Testimony", and the speakers will be David W. Peck, Presiding Justice, Supreme Court, Appellate Division, First Department, State of New York, and Emory H. Niles, Chief Judge, Supreme Bench of Baltimore, Maryland. Tuesday afternoon will be devoted to "The Activities and Problems of the Department of Justice". The principal speaker will be Herbert Brownell, Jr., Attorney General of the United States, to be followed by short talks by members of his staff. The Annual Dinner in honor of the Judiciary of the United States is scheduled for Monday evening, August 27, at The Statler Hilton. The luncheon for federal and state judges will be held Tuesday noon, August 28, at the Dallas Athletic Club. On Wednesday morning, August 29, there will be a conference sponsored by the Committee on Cooperation with Laymen at The Statler Hilton. The speakers will include Arthur A. Smith, Vice President of First National Bank, Dallas, Texas, John E. Hickman, Chief Justice, Supreme Court of Texas, Dorothy Young, Judge, Juvenile Court of Tulsa County, Oklahoma, and William B. McKesson, Judge, Supreme Court, Los Angeles County, California. At the Thursday morning session, August 30, the Traffic Courts and Justice of the Peace Courts program will be discussed, followed by the business meeting of the Section.

The activities of the **Junior Bar Conference,** most of which are scheduled for The Baker Hotel, include a breakfast on Saturday morning, August 25. General sessions will be held on Saturday and Sunday, August 25 and 26. The Honorable St. John Garwood, Associate Justice of the Supreme Court of Texas, will be the guest speaker at a luncheon Saturday noon, August 25. Immediately following there will be a workshop meeting for delegates from state and local groups. A reception has been scheduled for Sunday evening, at The Chalet, 6400 Gaston Avenue, Dallas. The traditional reception and dinner dance are scheduled for Saturday evening at The Baker Hotel. The debate and reception sponsored by the Conference on Personal Finance Law, will be held on Monday afternoon, August 27, at The Baker Hotel. The joint luncheon with the Section of International and Comparative Law will be held Tuesday noon, August 28, at The Hotel Adolphus. Victor C. Folsom, Chairman of the Section, and Robert G. Story, Jr., Chairman of the Conference, will preside.

The **Section of Labor Relations Law** will hold all of its meetings at the Hotel Adolphus. A general session Monday afternoon, August 27, will include reports of the Committee on Improving the Processes of Collective Bargaining, by the Co-Chairmen, Frederic D. Anderson, of Indianapolis, and Morris P. Glushien, New York City; Committee on Labor Arbitration, by Donald H. Wollett, Chairman, School of Law, University of Washington, Seattle; Committee on Improvement of Administration of Union-Employer Contracts, by Harry H. Platt, Chairman, Detroit; Committee on Labor Law Periodicals and Publications, by Munro Roberts, Chairman, St. Louis; and Committee on Education in Labor Relations Law, by Nicholas Kelley, Chairman, New York City. On Tuesday morning, August 28, the program will be presented by the State Bar of Texas and the Dallas Bar Association. A luncheon honoring members and General Counsel of the National Labor Relations Board will be held Tuesday noon. The final general session Tuesday afternoon will include reports of the Committee on National Labor Relations Act, by Co-Chairmen, Harry P. Jeffrey, Dayton, Ohio, and Thurlow B. Smoot, Cleveland, Ohio; Committee on National Labor Relations Board Practice and Procedure, by Tracy H. Ferguson, Chairman, Syracuse, New York; Committee on State Labor Legislation, by Russell A. Smith,

Chairman, School of Law, University of Michigan, Ann Arbor; and Committee on Wage-Hour Legislation, by William S. Tyson, Chairman, Washington, D.C. The meeting will close with a reception immediately following the afternoon session.

The **Section of Legal Education and Admissions to the Bar** will conduct sessions jointly with the **National Conference of Bar Examiners** on Monday afternoon and all day Tuesday, August 27 and 28, at The Statler Hilton. On Monday afternoon, the National Conference of Bar Examiners will have a workshop panel discussion. John Ritchie III, Dean of the University of Wisconsin Law School, will moderate. The panel members and subjects include John Eckler, member, Ohio Board of Bar Examiners, "How Many Times Should an Applicant Be Permitted To Take a Bar Examination?"; Edward S. Godfrey, Executive Secretary, Bar Examination Service Committee, and John C. Fitzgerald, Dean of the Loyola University Law School of Chicago, "Examinations for Law Schools and for the Bar: A Comparison"; Robert A. Sprecher, member, Illinois Board of Law Examiners, "Security and Bar Examination Questions", and Arthur Littleton, former member, Pennsylvania Board of Law Examiners, "Reappraisal of Borderline Examination Papers". A social hour has been scheduled for Monday evening. The program for Tuesday morning has been arranged by the Conference and the Section and will be highlighted by an addresss on "Responsibilities of the Profession to Law Students", by Olin Watts, Chairman, Florida State Board of Bar Examiners, followed by a panel discussion on "Pre-Legal Education". Joseph A. McClain, Jr., Dean, Duke University School of Law, will moderate. The speakers will be Erwin N. Griswold, Dean, Harvard University Law School, and James P. Hart, Austin, Texas. The discussion will be led by John T. Fey, Dean, George Washington University School of Law, and Lehan K. Tunks, Dean, Rutgers University School of Law. A joint luncheon has been scheduled for Tuesday noon. The speakers will be Marjorie Merritt, Director of the National Conference of Bar Examiners, "Twenty-five Years After", and John Ben Shepperd, Attorney General of Texas, "Open the Door, Blackstone". Tuesday afternoon there will be a panel discussion on "Continuing Professional Education". Robert G. Storey, Dean, Southern Methodist University School of Law, will act as moderator, and the speakers will be W. R. Woolrich, Dean, College of Engineering, University of Texas, Richard L. Kozelka, Dean, School of Business Administration, University of Minnesota, and Stanley W. Olson, Dean, School of Medicine, Baylor University. The discussion will be led by Lehan K. Tunks, Dean, Rutgers University School of Law, and John T. Fey, Dean, George Washington University School of Law.

The general sessions of the **Section of Mineral Law** are scheduled for the Hotel Adolphus all day Tuesday and Wednesday morning, August 28 and 29. Tuesday morning Raphael J. Moses, member, Colorado Water Conservation Board, Chairman, Water Section, Colorado Bar Association, and Special Assistant Attorney General for Rio Grande Compact, Alamosa, Colorado, will speak on "The Correlation of Surface and Underground Water Rights" and Clifford E. Fix, former Chief Counsel, Bureau of Reclamation, 1944-1950, Chairman, Committee on Codification Reclamation Laws; and member, Legislative Committee, National Reclamation Association, Twin Falls, Idaho, will speak on "Conflict Between Federal and State Water Laws". A panel discussion and question-and-answer period will follow. The participants include members of the Committee on Water Rights: Perry M. Ling, Phoenix, Arizona; Fred E. Wilson, Albuquerque, New Mexico; Calvin A. Behle, Salt Lake City, Utah; Booth Kellough, Tulsa, Oklahoma; and John Shaw Field, Reno, Nevada. "Is Percentage Depletion a Tax Loophole to the Oil and Gas Industry? Present Efforts To Eliminate Percentage Depletion from the Income Tax Laws" by Guy H. Woodward, Tulsa, Oklahoma, will then be presented. On Tuesday afternoon, Price Daniel, United States Senator from Texas, will address the Section on "What Happened to the Harris-Fulbright Amendment to the Natural Gas Act?". Then to be presented is a panel discussion on The Natural Gas Act. The subjects and speakers will be "Problems of the Producer Occasioned by Regulation Under the Act and His Points of View with Respect Thereto" by David T. Searls, Houston, Texas, and "The Exemption of Producers from Regulation Under the Act with Respect to the Interests of Utilities and Consumers" (speaker to be announced.) An address will be given by Tom Pickett, Executive Vice President, National Coal Association, Washington, D.C., "Free Enterprise for Fuel Producers". On Wednesday morning there will be a joint session with the Section of Public Utility Law. The program will include the report of the Committee on Atomic Energy, and the following addresses: "Legal Problems in the Development and Utilization of Atomic Power" by E. Blythe Stason, Dean, School of Law, University of Michigan; "The Role of the State in Atomic Energy Legislation" by Jacques P. Adoue, Chairman, Atomic Energy Committee, State Bar of Texas; and "Insurance Against Hazards in the Atomic Energy Industry" by Arthur Murphy, New York City. A reception is being planned for Wednesday evening.

All of the sessions of the **Municipal Law Section** will be held at the Hotel Adolphus with the exception of the luncheon meeting on Tuesday, August 28, which will be at The Baker Hotel. The Honorable R. L. Thornton, Mayor of Dallas, will be the speaker. The highlights of the regular session on Monday afternoon, August 27, will include

an opening paper on the subject of "Housing Codes in Urban Renewal", with the principal speaker, Joseph Guandolo, Associate General Counsel of the Housing and Home Finance Agency at Washington, D.C. In addition, P. B. Garrett, President of the Texas Bank and Trust Company of Dallas, will address the Section on "Municipal Law and Finance". The Tuesday session, August 28, will be devoted principally to metropolitan area problems. The speakers will include Donald R. Larson, member of the Metropolitan Charter Board at Miami, Florida, "Solving the Metropolitan Puzzle—The Miami Plan"; R. Gordon Kean, Jr., Parish Attorney, Baton Rouge, Louisiana, "Solving Metropolitan Area Problems—The Greater Baton Rouge Plan"; Daniel Mandelker of the University of Indiana, "Municipal Incorporation on the Urban Fringe"; and Sidney Goldstein, General Counsel of the Port of New York Authority, "Metropolitan Area Government—A Functional Approach—The Authority Role". Sunday afternoon, August 26, preceding the opening sessions, the committee reports will be presented. It is anticipated that the subjects to be discussed at the Dallas meeting of the Municipal Law Section will be of significant importance and all lawyers interested in any phase of municipal work are urged to attend.

The Section of Patent, Trademark and Copyright Law will hold all of its sessions at The Baker Hotel, with the exception of Monday afternoon, August 27, when the Section will join with the Section of Corporation, Banking and Business Law in a moot appeal argument. The judges who will preside over the court will be Raymond S. Wilkins, Chief Justice, Supreme Court of Massachusetts, Douglas Hudson, Fort Scott, Kansas, and Robert J. Farley, Dean, Law School, University of Mississippi. Representing the Corporation Section will be Carl Elbridge Newton, New York City, Carl F. Farbach, New York City, Edward P. Wright, Detroit, Walter J. Cummings, Jr., Chicago, Frederick W. Potter, Chicago, and Herman F. Selvin, Los Angeles. Representing the Patent Section will be Thomas Oren Arnold, Houston, Morgan L. Fitch, Jr., Chicago, Russell L. Law, Washington, D.C., James M. Naylor, San Francisco, Robert Bonynge, New York City, and Fulton B. Flick, Pittsburgh. General sessions of the Section will be held all day Tuesday, Wednesday morning and Thursday morning, August 28, 29 and 30. On Saturday, August 25, the Council will meet in the morning and the Copyright Symposium is scheduled for the afternoon. Robert J. Burton will discuss recordings; Seymour Bricker, motion pictures; Max K. Lerner, musical performance; and Joseph A. McDonald, broadcasting. Sunday afternoon, August 26, Robert C. Watson, Commissioner of Patents, will address the Section. A reception and Mexican-American dinner is planned for Sunday evening. The annual dinner of the Section will take place Tuesday evening and will be preceded by a reception tendered by the Patent Section of the State Bar of Texas. The United States Trademark Association has scheduled a luncheon for Sunday noon. On Monday morning the National Council of Patent Law Associations will hold its annual breakfast. The International Patent and Trademark Association annual luncheon is being planned for Tuesday noon.

The **Section of Public Utility Law** will hold all of its sessions in The Baker Hotel, with the exception of the Wednesday morning session, August 29, which will be held jointly with the Section of Mineral Law at the Hotel Adolphus. On Monday afternoon, August 27, there will be a panel discussion on developments during the year in the field of Public Utility Law. On Tuesday morning, August 28, the topic for discussion will be "Rate Regulation Problems Facing the Natural Gas Industry". Addresses relating to this topic will be "The Producer" by Carl Illig, Houston, Texas; "The Commission" by Willard Gatchell, Washington, D.C; "The Distributor" by Randall J. LeBoeuf, Jr., New York City; and "The Consumer" by Charles W. Smith, Baltimore, Maryland. Tuesday afternoon the topic will be "Problems in Transportation Regulation". Addresses relating to this topic will be "Scope of Operation of Surface Carriers: Common, Contract, Private" by David I. Mackie, Chairman of Eastern Railroad Presidents Conference; "Freedom of Entry in Air Transportation" by Robert L. Clark, Dallas, Texas; and "Uncontrolled Exercise of the State Taxing Power as an Oppressive Burden on Interstate Carriers" by George L. Haskins, Professor of Law at the University of Pennsylvania. At the joint session with the Section of Mineral Law on Wednesday morning, the topic for discussion will be "Atomic Energy Problems in Industry Today". Addresses relating to this topic will be "Legal Problems in the Development and Utilization of Atomic Power" by E. Blythe Stason, Dean of the University of Michigan Law School; "The Role of the States in Atomic Energy Regulation" by Jacques P. Adoue, Chairman of the State Bar of Texas Atomic Energy Committee; and "Insurance Against Hazards in the Atomic Power Industry" by Arthur W. Murphy, head of the Legislative Drafting Research Fund of Columbia University. A dinner dance has been scheduled for Tuesday evening at The Statler Hilton.

The **Section of Real Property, Probate and Trust Law**, meeting at the Hotel Adolphus, will hold division sessions on Monday afternoon, August 27, Tuesday morning, August 28 and Wednesday morning, August 29. The Real Property Law Division will meet Monday at which time the following will speak: Harold L. Reeve, Chicago, Illinois, "Relative Priority of Government and Private Liens"; Lawrence L. Otis, of Los Angeles, California, "Circuity of Liens—a First Rate Legal Puzzle"; and Samuel S. Sherman, Jr., Denver, Colorado, on "Hedges Against Infla-

tion in Leases on Real Property". A reception is being planned for Monday evening. There will be a breakfast meeting for officers, members of the Council and chairmen and members of committees on Tuesday morning. Immediately following the breakfast, the Probate Law Division meeting will include addresses given by: Alice M. Bright, Chicago, Illinois, "Permitting a Testator To Choose the Place for Probate of His Estate—Policy and Problems"; Frank L. McAvinchey, Judge of Probate, Flint, Michigan, "The Not-Quite Incompetent Incompetent"; and Victor R. Hansen, Judge of the Superior Court, Los Angeles, California, "Holographic Wills". The Annual Dinner of the Section will be held on Tuesday at Godfrey Ranch, sixteen miles outside Dallas. The Ranch will be available from 4:00 till 11:00 P.M. for swimming, horseback riding and square dancing. A chuckwagon dinner will be served. Bus transportation will be furnished. The Annual Meeting of the Section followed by the Trust Law Division meeting is scheduled for Wednesday morning. The addresses will include "A Vacuum in Our Law"—management of property of persons in the twilight zone between competency and incompetency, by James O. Wynn, New York City; and "Trusts in Divorce Settlement", by James B. Lewis, New York City. Mr. Lewis will also discuss the effect of the new estate and gift tax regulations on trusts generally.

The **Section of Taxation** will hold all of its meetings at The Statler Hilton. Business sessions will be held all day Saturday and all day Sunday, August 25 and 26, with luncheons scheduled at noon on each day. Wilbur D. Mills, member of the Ways and Means Committee, and Chairman, Subcommittee on Tax Policy of the Joint Committee on the Economic Report, will speak on "Tax Policy for Economic Growth", at the Saturday luncheon, and Russell C. Harrington, Commissioner of Internal Revenue, will speak on the subject "Administration of Federal Taxes", at the Sunday luncheon. A business session is scheduled for Monday afternoon, August 27, and a technical session for Tuesday morning, August 28. This session will include subjects on "Investor-Operator Problems and the Provisions of Sub-chapter K", and "Community Property and Conflict of Laws Problems of the Investor and Operator". A special session on State and Local Taxes will be held at The Baker Hotel, Tuesday afternoon. The subjects for discussion are "Co-ordination of Research in State and Local Taxation" by Arthur D. Lynn, Jr., Professor at Ohio State University, and "Interstate Commerce: To What Extent May Congress Define the Areas of State and Local Taxation" by Jess N. Rosenberg, General Counsel, Western Highway Institute. Then to be presented will be a panel discussion on "Severance Taxes in the Production of Oil".

Among the affiliated organizations holding meetings during the time of the American Bar Association meeting will be the **American Judicature Society,** which will hold a breakfast meeting on Tuesday morning, August 28, in The Statler Hilton; the **American Law Student Association** will meet starting Saturday, August 25, through Thursday, August 30, at the Hotel Dallas; the **Judge Advocates Association** has scheduled its annual dinner at the El Fenix Restaurant, 1608 McKinney Avenue, Dallas, Tuesday evening, August 28, and their annual meeting in the club rooms of the Dallas Bar Association, Hotel Adolphus, Wednesday afternoon, August 29; the **National Conference of Commissioners on Uniform State Laws** will meet from Monday, August 20, through Saturday noon, August 25, at The Statler Hilton; the **National Conference of Bar Presidents** will meet all day Sunday, August 26, at The Statler Hilton; the **National Conference of Bar Secretaries** will meet Sunday afternoon, August 26, at The Baker Hotel. There will be numerous meetings of law school alumni associations and legal fraternities.

A complete schedule of meetings will appear in the Program of the Annual Meeting, which will be mailed to all members of the Association about August 1.

Make Your Hotel Reservations Now!

■ The Seventy-Ninth Annual Meeting of the American Bar Association will be held in Dallas, Texas, August 27 to August 31, 1956.

Attention is called to the fact that many interesting and worthwhile events of the meeting will be arranged, as usual, to take place on Saturday and Sunday, August 25 and 26, preceding the opening sessions of the Assembly and the House of Delegates on Monday, August 27.

Requests for hotel reservations should be promptly addressed to the Reservation Department, American Bar Association, 1155 East Sixtieth Street, Chicago, 37, Illinois, and should be accompanied by payment of the $10.00 registration for *each lawyer* for whom reservation is requested. *Be sure to indicate three choices of hotels* and give us your definite date of arrival as well as probable departure. *All space in the Statler Hilton, Baker and Adolphus Hotels is now exhausted.* Sleeping accommodations are still available in the following air-conditioned hotels: Cliff Towers, Crestpark, Dallas, Highlander, Lawrence, Loma Alto, Lynn, Mayfair, Melrose, Miramar, Southland, Travis, White-Plaza, Whitmore, and Wynnewood. Accommodations are also available in the following air-conditioned motor hotels: Belmont, Dallasite, Lido, Parkway and Oaks Manor.

Reservations will be confirmed as promptly as possible.

More detailed announcement with respect to the making of hotel arrangements may be found in the January issue of the JOURNAL, page 78.

Deep in the Heart of Texas,

The Entertainment Plans Are BIG, Pardner!

■ Clouds of dust are being kicked up in Dallas, Texas, and it's not attributable to stampeding cattle, the antics of bronc-busters, or the wind agitating the peaceful prairie.

Fact is: Dallas lawyers and their wives are scurrying about readying for the "biggest and best yet" Annual Meeting of the American Bar Association.

You've no doubt heard that everything is BIG in TEXAS, and Dallasites welcome the opportunity to prove just that.

The first scheduled spectacle for the Bar's conclave will be the President's Reception which will be held in the Umphrey Lee Student Center at Southern Methodist University, August 26.

Dean Robert G. Storey, the faculty and students at the Southwestern Legal Center have promised to lay aside their six-shooters and corral the mustangs before they greet the visitors who tour the famed Legal Center following the reception.

Noted internationally for its devotion to the improvement of the administration of justice, the Southwestern Legal Center houses the S.M.U. School of Law and the Southwestern Legal Foundation.

On Monday evening, August 27, the entire auditorium at the beautiful Fair Park has been reserved for the visiting lawyers. The occasion will be a showing of the operetta, *Show Boat*, featuring famed star Shirley Jones. All "tender-feet" and their ladies will be pleased to know that the massive auditorium is fully air-conditioned.

A "Giant Extravaganza" is being planned for Wednesday evening, August 29. Dallas "Bar-yers" are highly secretive about the plans, but various clues lifted from sage-brush hiding places indicate that an array of radio, television and stage personalities will be on hand to help make "whoopee".

Tentatively, the "Texas-sized" show is planned to be held in the new two-and-a-half million dollar, 12,000-seat capacity coliseum on the campus of S.M.U. If these plans harden, the visiting Association members will initiate the air-conditioned coliseum which is scheduled for completion in early August.

W. H. Jack, entertainment-hospitality chairman for the Dallas Meeting, promises "something out of the ordinary" for those who venture deep into the heart of Texas.

And the ladies' entertainment, headed by Mrs. E. Taylor Armstrong, President of the Dallas Lawyers Wives Club, is well past the planning stage.

The ladies will be taken on a bus tour of "Big D" on Monday, August 27, which will be followed with a *kaffeeklatsch*.

World-noted fashions from Neiman-Marcus will be previewed at a seated tea and style show slated for Tuesday, August 28, in the Grand Ballroom of the equally famed Statler-Hilton Hotel.

For those who might miss the show, a block of reservations has been made for the weekly luncheon-style show on Wednesday in the Empire Room at the Statler-Hilton.

Also on Wednesday's agenda will be a book review by Mrs. Hubert Emery, well-known and popular Dallas book reviewer, in the auditorium of the ultra-modern Republic National Bank Building. A tour of the bank building will follow the book review.

If popular demand merits it, the book review and tour will be repeated Thursday for those who might have missed the event Wednesday.

Plans for the entertainment features of the meeting are by no means complete, but what has been tentatively planned is a good indication of the calibre of the social activity.

Prior to the opening of the American Bar Association meeting, the eighth annual Conference of Chief Justices will be held in Dallas, August 22-25.

A reception and dinner for the Chief Justices, their wives and special guests is planned for August 23, and on Friday, August 24, the group will be guests of the Dallas Bar Association at an operetta at Fair Park Auditorium.

Dwight L. Simmons, President of the Dallas Bar Association, will be host at a luncheon for the Chief Justices on Friday, August 24.

These plans, also, are but a few of those in the offing for the Conference of Chief Justices.

Transportation for all major events, and for both gatherings, will be provided. And don't "fret" about saddlesores from being toted horseback—some forms of horseless carriages will be employed in all instances.

The dust will have settled by the time of your arrival in fabulous Dallas, and you can inhale the sweet-scented, pure air and settle down to enjoy all the entertainment features which will be awaiting your participation.

And it might be well to bring an empty container along with you on this trip—it's quite possible you'll want to capture some of this sun-kissed, Gulf-blessed Texas air for a refresher after you leave the star-studded state.

AMERICAN BAR ASSOCIATION

Journal

TAPPAN GREGORY, *Editor-in Chief*.....Chicago, Ill.
LOUISE CHILD, *Assistant to the Editor-in Chief*....Chicago, Ill.

BOARD OF EDITORS

GEORGE ROSSMAN ..... Salem, Ore.
RICHARD BENTLEY ..... Chicago, Ill.
EUGENE C. GERHART..... Binghamton, N Y
ROY E WILLY.....Sioux Falls, S Dak
E. J. DIMOCK..... New York, N Y
DAVID F. MAXWELL .....Philadelphia, Pa
ALFRED J. SCHWEPPE .....Seattle, Wash
E. SMYTHE GAMBRELL, *President of the Association* .....
..... Atlanta, Georgia
JOHN D. RANDALL, *Chairman, House of Delegates*.....
..... Cedar Rapids, Ia.
HAROLD H. BREDELL, *Treasurer of the Association* .....
..... Indianapolis, Ind.

General Subscription price for non-members, $5 a year.
Students in Law Schools, $3 a year.
Price for a single copy, 75 cents, to members, 50 cents.
Members of the American Law Student Association, $1.50 a year.

EDITORIAL OFFICES

1155 East 60th Street ....Chicago 37, Ill.

■ *A* Journal *Acceptable to All*

The JOURNAL in its present form as a monthly came into being with the issue of September, 1920. It had been a quarterly. In launching the new project, the Editors referred to a resolution passed by the Executive Committee approving certain changes in the magazine "to the end that it may be more attractive, more interesting to members of the Association and the Bar generally, and, if possible, a more powerful adjunct of the Association in respect of increasing the membership and interest in the Association".

The Board of Editors thus, in part, described how the first issue was developed:

> The new Journal had to be created, the method largely being to look over the entire field of legal publications and decide what features appeared best suited to aid in expanding the professional interest and usefulness of the Journal. The fact that it was the official publication of the Association and must not lose that character was of course kept in mind; in fact, was the point of departure for the plan. . . . Organization of the best sources of information in the States available on emergency call was at once begun. Letters were sent to the members of the general council in each state for local matters of general interest to the profession, to the Secretaries of the State Bar Associations, and to the Chairmen of Sections. Independent sources for special articles for the non-departmental part of the Journal were also approached. . . . It is obvious that full success along the lines approved by the Executive Committee must be a matter of growth. The mere appearance of the magazine in this form naturally gives a more definite idea of what is suitable in the way of contributions to departments than any amount of statement. Both officials and members should, therefore, find it easy when they run across something suited to the Journal to file it away or send it in at once. With very little effort on the part of officials and members in the various states a monthly Journal can secure plenty of pertinent, profitable and current material. . . . But success will not come by chance or without the cordial co operation of our members. The active interest of the entire membership is most indispensable. If that is enlisted the magazine may be made a highly effective organ for the expression of Bar Association ideas and the furtherance of Association undertakings. . . . The plans of the Editorial Board must necessarily be somewhat a matter of evolution. It is not at present intended to enter the field now so well filled by the old and well established law reviews and periodicals. It is anticipated that as a rule, our leading articles will be of a rather less technical and more general character; and that the items of professional interest which we gather will be of a somewhat more personal character and more immediately related to the activities of the Association and kindred bodies and of our membership. On all these topics the Board will be glad to receive the suggestions of our members.

On the editorial pages of that first issue there also appeared a box containing this note:

> Interesting anecdotes, instances of court room repartee, stories of queer cases, unusual happenings in court, unique phraseology in Wills, deeds or other legal documents, in fact any little legal story tinged with wit or spiced with novelty, will be welcomed by the Journal.

These quotations set forth in substance the principles which have guided the Editors ever since and constitute, as it were, the charter under which the JOURNAL has grown and progressed under the direction of our able predecessors.

In earnest of our eagerness to carry on pursuant to those directives to the best of our ability, we venture to call attention to an editorial expression taken from the issue of April, 1949:

> The Journal is published for the members of the Association. It is their magazine. They keep it alive. Its pages are open to all of them for expression of views, report of news, suggestions, full-length articles. The Editors welcome contributions of all sorts, while of necessity reserving the right, as they owe the duty, to determine suitability in the light of content, subject matter, timeliness and availability of space. The responsibility belongs to the Board of Editors to determine makeup, character, substance and form—always with the objective of presenting in each issue matters of lively interest pertinent to the problems of the profession.
>
> In the membership of the Association there are thousands entertaining views opposed to the ideas of thousands of others upon many live issues on which lawyers should and do have definite and firmly held opinions. These they should feel free to develop through the medium of the Journal. . . . We want both sides of important questions

brought forward and examined between the covers of our magazine for the mutual benefit of all. Freedom of discussion contributes mightily to clarification.

We cannot always stand aloof editorially. There are times when we feel impelled to take a strong unequivocal stand on matters involving, in our judgment, some principle not to be compromised. On these occasions we, of course, hope to be persuasive, though, obviously, there will be areas of disagreement. Nothing we say, however, will prejudice the right of any one else to express himself as he will.

Turning again to the September, 1920, issue for a moment, we call attention to several other notes. At the head of the Department on "Activities of State Bar Associations" there is a paragraph in a box requesting secretaries of state bar associations to submit news items and continuing, "In brief, anything showing what the membership, committees and leaders in the State Bar Association are thinking and doing with respect to matters of professional interest. Secretaries can help to make this department one of the most interesting in the Journal. The collection of reports will enable each State Bar Association to see every month what the others are doing and to avail itself of any suggestion contained in their activities." This policy has been continued and broadened in our present Department on Bar Activities. This is true of the text in the box at the head of the Department then entitled "Letters from Members". There it was said, "This department is designed as an open forum in which the members of the American Bar Association may express their opinions . . . a clearing house of timely and pertinent views." We call it "Views of our Readers" and strongly urge all our members to make free and frequent use of it. The only Department originally carried and long since discontinued, was "Necrology". On the other hand, we have added many new ones. We now carry these:

The President's Page
Views of Our Readers
Books for Lawyers
Activities of Sections
Review of Recent Supreme Court Decisions (all inclusive)
What's New in the Law (Decisions of State and Federal Courts and Administrative Boards)
Tax Notes
Our Younger Lawyers
Bar Activities
Practicing Lawyers' Guide to the Current Law Magazines
Legislation
International Law

Occasionally one of these is omitted because of lack of space, but not very often. The magazine now contains from 88 to 104 pages and once in a while more. The September, 1920, issue was of 64 pages. On the back of it was a suggested form of "Membership proposal".

There are several things to keep in mind in appraising the quality of the JOURNAL and its coverage to determine how well it fulfills its functions and wherein it fails.

It is issued only once a month and therefore cannot serve the purposes for which a weekly or bi-weekly bulletin or news letter would be pre-eminently suited.

It is not a law review.

It is not exclusively a "house organ".

It cannot report American Bar Association actions except after the Association has acted through Assembly, House of Delegates or Board of Governors. But it can and does report Section activities and proceedings had at Regional Meetings.

It cannot attempt to cover court decisions and statutes in all state jurisdictions except on a selective basis where the subject matter is of general interest to the Bar throughout the Nation and not of purely local concern.

It is our objective to keep in each issue a fair balance between scholarly articles and those of practical, useful content touching on problems common to us all and helpful in our everyday tasks; and rounded out by the inclusion of interesting departmental material; hopeful that everyone may find something each time to attract and hold his interest. Try as we may, we cannot please everybody. That is well; for it is good that we keep our sights high and achievement of our aims near enough to inspire contant effort but always just out of reach. We have made mistakes and we shall err again in spite of all we can do to prevent recurrence; for we are human and sensitive to human frailties. And we shall always welcome and mark well constructive suggestion for improvement, that we may continue to hope someday to produce a JOURNAL acceptable to all.

Books for Lawyers

LAWYER'S GUIDE TO ACCOUNTING. *By H. A. Finney and Richard S. Oldberg. Englewood Cliffs, New Jersey: Prentice-Hall, Inc. 1955. $7.65. Pages xxi, 291.*

This comparatively short book, the fruit of the combined labors of a lawyer and a C.P.A., comes closer than any other to meeting the needs of the lawyer seeking to achieve a working knowledge of the principles and procedures of accounting. It is written in clear, direct diction; and it is authoritative, technically flawless. Mr. Finney has long been distinguished in the forefront of accounting education. His present contribution is most welcome.

The first seventy-six pages present the mechanics of simple bookkeeping, the indispensable initial step to the understanding of accounting. The remaining 200 pages are devoted to the varied phases of accounting: its principles and conventions; a discussion of the nature and accounting treatment of the various types of assets, liabilities and reserves; the presentation and analysis of financial statements; the accounting for the individual proprietorship, the partnership, and the corporation; and, finally, consolidated corporate financial statements. Any discussion of legal implications is purely incidental; tax problems are almost wholly avoided; all of which is commendable in this type of book.

With due deference to the distinguished authors of this volume, and without detracting from the great merit of an excellent work, one can wish they had given us more, in these respects:

Except for a portion of page 83, the book is virtually silent on the subject of auditing and the audit report. These are vital phases of accounting practice, the media through which the accountant speaks to the lawyer and the public. How to read the C.P.A. certificate and the C.P.A. report, respecting which grave misconceptions are common, should be made known to the lawyer. "That every like is not the same, O Caesar, The heart of Brutus yearns to think upon!" Too many lawyers still believe that every statement that issues from the office of the accountant represents an audit, an audit report, and an unqualified opinion. The attorney should, at the least, achieve an awareness of the distinctions between an unqualified opinion of the C.P.A. report, and the qualified opinion, and the "no opinion" report, and recognize the presence or the absence of one or the other.

Nearly all works on accounting lack synthesis; the present book shares that infirmity. Analysis should be supplemented, or, better still, preceded by synthesis. Dwelling at length on the mechanics of bookkeeping and on each specific phase of accounting (none of which should be omitted, however), the parts are not pieced together into a connected whole. Interest and understanding would be advanced by a photograph of the whole house, in addition to the pictures of the individual rooms. Why not view the scene whole, before inspecting its parts? In addressing the mature, disciplined, law-trained mind, an author need not fear to venture upon statements of abstract principles and generalized formulae, in accounting and in bookkeeping. See, for instance, the five-page statement of "Accounting in a Nutshell" in 39 A.B.A.J. 467, and the 127-page pamphlet of American Law Institute, *Basic Accounting for Lawyers* (both of which incidentally, refer the reader to Finney for further study, and both of which may be a worth-while prelude to the reading of the volume under review).

Furthermore, must a work on accounting be dry-as-dust, as lawyers are too ready to believe? Must there be no lustre, no sparkle, no intellectual challenge, no stimulus to the imagination? This book strives to engage reader interest by two devices: the introductory pages pose "Twenty Questions" and Chapter 23 bears the title "An Accounting Detective Story". However, consider this contrast: On page 102 we find: "Advice to lawyers. From the foregoing, lawyers will recognize that 'net income' may mean one thing to some accountants and another thing to other accountants." (Actually, the difference referred to is that of procedure in presentation of two figures: shall they appear at the foot of the Income Statement or in the Statement of Earned Surplus? That difference is important; no lawyer with an awareness of varying accounting concepts and procedures will use the term "net income" without further specification.) As to tone, which is what we discuss here, compare that with the following at page 468 of 39 A.B.A.J.: "Accounting principles, like legal principles, admit of variations and exceptions; and again, like legal principles, accounting principles compete with each other, calling for a skilled choice between competing, if not conflicting, concepts. To the law-trained mind this is familiar doctrine; and it is because of these parallels between law and accounting that the lawyer, once he has mastered the rudiments of bookkeeping, can quickly and with facility comprehend accounting theory and practice, and find pleasure and profit in the pursuit."

LOUIS S. GOLDBERG

Sioux City, Iowa

DOCTOR AND PATIENT AND THE LAW. Third Edition. *By Louis J. Regan. St. Louis: C. V. Mosby Company. 1956. $12.50. Pages 716.*

This book and its title have little in common. It might better have been called "Selected Sermons on the Evils of Medical Malpractice Suits". Actually, the first edition, back in 1943, was called "Medical Malpractice", the present title not appearing until the second edition in 1949. For doctors, dentists, hospitals, nurses and everybody else who might land in the way of a malpractice suit, the book provides all kinds of timely tips on avoidance, complete with big-letter reminders and self-test check lists on how to play a winning game of mum's the word, already pretty well mastered by most of the profession.

The author, Louis J. Regan, who died only a month before this new third edition, could call himself either doctor or lawyer. Actually, he was all doctor, with rather impressive connections with several California hospitals. His principal claim to being lawyer too was the LL.B. degree that he received in middle life from a correspondence study law school. With that in hand, he became in the very next year, according to his Who's Who listing, a "specialist in legal medicine, Los Angeles", and remained so until his death on December 3, 1955. As might be expected though, he never quite acquired that simple, detached objectivity which comes only gradually to those who work actively in the give and take of full-time lawyering. He remained always a doctor. And yet, he knew just enough about the law side to become indeed what he said he was, a "specialist in legal medicine", and a good one too, rising to the top of the heap in the science of defending malpractice litigation.

His philosophy is shortly summed in a sentence from the preface: "Every intelligent person must recognize the vital importance of the prevention of malpractice claims, *both the meritorious and the non-meritorious*". (Italics ours, page 9). Why? No one has ever championed such an expedient in other fields of litigation. Why should meritorious malpractice claims be suppressed any more than meritorious suits for the recovery, let us say, of physicians' fees?

The answer is simple, at least to Dr. Regan. A charge of malpractice is upsetting to the ego. It is disturbing to a doctor's peace of mind and self-confidence. In Dr. Regan's view there is almost no such thing as a meritorious claim anyway. They are simply the concoctions of misguided opportunists and vengeful malcontents. The whole collective plaintiff is cast as a kind of cobra in a chamber pot, ready to strike just as soon as the good doctor gets in range, strike without provocation, just to embarrass him and make money out of him.

The real villain though, more than the plaintiff and his attorneys, is the lowlife doctor who may come forward to give testimony in the plaintiff's behalf. He shows himself to be an "apparently conscienceless physician preying on his colleagues, [and] by his profit seeking efforts [is] directly and actively contributing to the perversion of justice . . . he is a menace to the public welfare" (page 203). Of course, Dr. Regan recognizes that expert testimony is necessary in most cases if the plaintiff is to prevail, but apparently, the plaintiff is not supposed to prevail. Thus, "the present use of adversary expert medical witnesses is corrupting and immoral".

Actually of course, the malpractice plaintiff rarely does prevail. The reason is not necessarily that he has no case, but rather, that it is next to impossible for him to prove the case he has. Defending doctors, though enjoying no immunity by law, are often given one just about as good by their brethren in the profession. Plaintiffs' lawyers have long lamented the "conspiracy of silence" which suddenly wells up in the medical profession just as soon as a member is sued (See 16 NACCA L. J. 337; 15 *id.* 361; 11 *id.* 172; 10 *id.* 257).

Dr. Regan would not change that. Instead, he urges the profession to be even more careful. In Chapter 17 on "Malpractice Prophylaxis", he counsels the doctor to keep quiet, never admit a mistake, never let it be known that malpractice insurance is carried; never criticize another physician's work. On page 529, he reduces the message to five big-letter words, "DON'T TALK SO MUCH, DOCTOR!"

There is a lot of law in this book besides the preaching. Even in the discussion of legal points though, there is the same pro-defendant slant. The author regrets the slipping of the charitable immunity doctrine as to hospitals, but urges that "since the hospitals cannot legally practice medicine, it is illogical and inequitable to hold the hospital liable for the professional acts of the house staff carried on within its walls, even though those who make up the house staff are technically in the employ of the hospital" (page 176). On proof, he likes the presumption that a physician did his duty, that he was not negligent (page 285). He likes the doctrines of contributory negligence and comparative negligence but he sees no place at all for *res ipsa loquitur*. It unjustly burdens the defendant and is against the public interest (pages 227, 525). Thus, if a slop-jar full of carpet tacks shows up in a patient after surgery, the patient should seemingly have to prove that something went wrong. And the only "well reasoned" case on ownership of X-ray films is one which gives them to the physician (page 455). For physicians in those backward states where ownership is found in the patient, a form is provided for the patient's release or assignment of interest to the doctor, so that he, the patient, may assume his rightful role of hunting the evidence when he needs it.

One cannot help sharing some of the author's concern over the evils of malpractice suits. They are of course destructive of a man's reputation and professional standing, and

Books for Lawyers

LAWYER'S GUIDE TO ACCOUNTING. *By H. A. Finney and Richard S. Oldberg. Englewood Cliffs, New Jersey: Prentice-Hall, Inc. 1955. $7.65. Pages xxi, 291.*

This comparatively short book, the fruit of the combined labors of a lawyer and a C.P.A., comes closer than any other to meeting the needs of the lawyer seeking to achieve a working knowledge of the principles and procedures of accounting. It is written in clear, direct diction; and it is authoritative, technically flawless. Mr. Finney has long been distinguished in the forefront of accounting education. His present contribution is most welcome.

The first seventy-six pages present the mechanics of simple bookkeeping, the indispensable initial step to the understanding of accounting. The remaining 200 pages are devoted to the varied phases of accounting: its principles and conventions; a discussion of the nature and accounting treatment of the various types of assets, liabilities and reserves; the presentation and analysis of financial statements; the accounting for the individual proprietorship, the partnership, and the corporation; and, finally, consolidated corporate financial statements. Any discussion of legal implications is purely incidental; tax problems are almost wholly avoided; all of which is commendable in this type of book.

With due deference to the distinguished authors of this volume, and without detracting from the great merit of an excellent work, one can wish they had given us more, in these respects:

Except for a portion of page 83, the book is virtually silent on the subject of auditing and the audit report. These are vital phases of accounting practice, the media through which the accountant speaks to the lawyer and the public. How to read the C.P.A. certificate and the C.P.A. report, respecting which grave misconceptions are common, should be made known to the lawyer. "That every like is not the same, O Caesar, The heart of Brutus yearns to think upon!" Too many lawyers still believe that every statement that issues from the office of the accountant represents an audit, an audit report, and an unqualified opinion. The attorney should, at the least, achieve an awareness of the distinctions between an unqualified opinion of the C.P.A. report, and the qualified opinion, and the "no opinion" report, and recognize the presence or the absence of one or the other.

Nearly all works on accounting lack synthesis; the present book shares that infirmity. Analysis should be supplemented, or, better still, preceded by synthesis. Dwelling at length on the mechanics of bookkeeping and on each specific phase of accounting (none of which should be omitted, however), the parts are not pieced together into a connected whole. Interest and understanding would be advanced by a photograph of the whole house, in addition to the pictures of the individual rooms. Why not view the scene whole, before inspecting its parts? In addressing the mature, disciplined, law-trained mind, an author need not fear to venture upon statements of abstract principles and generalized formulae, in accounting and in bookkeeping. See, for instance, the five-page statement of "Accounting in a Nutshell" in 39 A.B.A.J. 467, and the 127-page pamphlet of American Law Institute, *Basic Accounting for Lawyers* (both of which incidentally, refer the reader to Finney for further study, and both of which may be a worth-while prelude to the reading of the volume under review).

Furthermore, must a work on accounting be dry-as-dust, as lawyers are too ready to believe? Must there be no lustre, no sparkle, no intellectual challenge, no stimulus to the imagination? This book strives to engage reader interest by two devices: the introductory pages pose "Twenty Questions" and Chapter 23 bears the title "An Accounting Detective Story". However, consider this contrast: On page 102 we find: "Advice to lawyers. From the foregoing, lawyers will recognize that 'net income' may mean one thing to some accountants and another thing to other accountants." (Actually, the difference referred to is that of procedure in presentation of two figures: shall they appear at the foot of the Income Statement or in the Statement of Earned Surplus? That difference is important; no lawyer with an awareness of varying accounting concepts and procedures will use the term "net income" without further specification.) As to tone, which is what we discuss here, compare that with the following at page 468 of 39 A.B.A.J.: "Accounting principles, like legal principles, admit of variations and exceptions; and again, like legal principles, accounting principles compete with each other, calling for a skilled choice between competing, if not conflicting, concepts. To the law-trained mind this is familiar doctrine; and it is because of these parallels between law and accounting that the lawyer, once he has mastered the rudiments of bookkeeping, can quickly and with facility comprehend accounting theory and practice, and find pleasure and profit in the pursuit."

LOUIS S. GOLDBERG

Sioux City, Iowa

DOCTOR AND PATIENT AND THE LAW. Third Edition. *By Louis J. Regan. St. Louis: C. V. Mosby Company. 1956. $12.50. Pages 716.*

This book and its title have little in common. It might better have been called "Selected Sermons on the Evils of Medical Malpractice Suits". Actually, the first edition, back in 1943, was called "Medical Malpractice", the present title not appearing until the second edition in 1949. For doctors, dentists, hospitals, nurses and everybody else who might land in the way of a malpractice suit, the book provides all kinds of timely tips on avoidance, complete with big-letter reminders and self-test check lists on how to play a winning game of mum's the word, already pretty well mastered by most of the profession.

The author, Louis J. Regan, who died only a month before this new third edition, could call himself either doctor or lawyer. Actually, he was all doctor, with rather impressive connections with several California hospitals. His principal claim to being lawyer too was the LL.B. degree that he received in middle life from a correspondence study law school. With that in hand, he became in the very next year, according to his Who's Who listing, a "specialist in legal medicine, Los Angeles", and remained so until his death on December 3, 1955. As might be expected though, he never quite acquired that simple, detached objectivity which comes only gradually to those who work actively in the give and take of full-time lawyering. He remained always a doctor. And yet, he knew just enough about the law side to become indeed what he said he was, a "specialist in legal medicine", and a good one too, rising to the top of the heap in the science of defending malpractice litigation.

His philosophy is shortly summed in a sentence from the preface: "Every intelligent person must recognize the vital importance of the prevention of malpractice claims, *both the meritorious and the non-meritorious*". (Italics ours, page 9). Why? No one has ever championed such an expedient in other fields of litigation. Why should meritorious malpractice claims be suppressed any more than meritorious suits for the recovery, let us say, of physicians' fees?

The answer is simple, at least to Dr. Regan. A charge of malpractice is upsetting to the ego. It is disturbing to a doctor's peace of mind and self-confidence. In Dr. Regan's view there is almost no such thing as a meritorious claim anyway. They are simply the concoctions of misguided opportunists and vengeful malcontents. The whole collective plaintiff is cast as a kind of cobra in a chamber pot, ready to strike just as soon as the good doctor gets in range, strike without provocation, just to embarrass him and make money out of him.

The real villain though, more than the plaintiff and his attorneys, is the lowlife doctor who may come forward to give testimony in the plaintiff's behalf. He shows himself to be an "apparently conscienceless physician preying on his colleagues, [and] by his profit seeking efforts [is] directly and actively contributing to the perversion of justice . . . he is a menace to the public welfare" (page 203). Of course, Dr. Regan recognizes that expert testimony is necessary in most cases if the plaintiff is to prevail, but apparently, the plaintiff is not supposed to prevail. Thus, "the present use of adversary expert medical witnesses is corrupting and immoral".

Actually of course, the malpractice plaintiff rarely does prevail. The reason is not necessarily that he has no case, but rather, that it is next to impossible for him to prove the case he has. Defending doctors, though enjoying no immunity by law, are often given one just about as good by their brethren in the profession. Plaintiffs' lawyers have long lamented the "conspiracy of silence" which suddenly wells up in the medical profession just as soon as a member is sued (See 16 NACCA L. J. 337; 15 *id.* 361; 11 *id.* 172; 10 *id.* 257).

Dr. Regan would not change that. Instead, he urges the profession to be even more careful. In Chapter 17 on "Malpractice Prophylaxis", he counsels the doctor to keep quiet, never admit a mistake, never let it be known that malpractice insurance is carried; never criticize another physician's work. On page 529, he reduces the message to five big-letter words, "DON'T TALK SO MUCH, DOCTOR!"

There is a lot of law in this book besides the preaching. Even in the discussion of legal points though, there is the same pro-defendant slant. The author regrets the slipping of the charitable immunity doctrine as to hospitals, but urges that "since the hospitals cannot legally practice medicine, it is illogical and inequitable to hold the hospital liable for the professional acts of the house staff carried on within its walls, even though those who make up the house staff are technically in the employ of the hospital" (page 176). On proof, he likes the presumption that a physician did his duty, that he was not negligent (page 285). He likes the doctrines of contributory negligence and comparative negligence but he sees no place at all for *res ipsa loquitur*. It unjustly burdens the defendant and is against the public interest (pages 227, 525). Thus, if a slop-jar full of carpet tacks shows up in a patient after surgery, the patient should seemingly have to prove that something went wrong. And the only "well reasoned" case on ownership of X-ray films is one which gives them to the physician (page 455). For physicians in those backward states where ownership is found in the patient, a form is provided for the patient's release or assignment of interest to the doctor, so that he, the patient, may assume his rightful role of hunting the evidence when he needs it.

One cannot help sharing some of the author's concern over the evils of malpractice suits. They are of course destructive of a man's reputation and professional standing, and

the awful injustice is that the occasional groundless one is just about as damaging reputation-wise as the worthy one. One solution lies in a united, systematic campaign by the whole profession and the whole society to prevent and suppress all claims, "both the meritorious and the non-meritorious". This is the solution so carefully detailed in this book.

There is, however, another course, and Dr. Regan knew it too. This reviewer was privileged to hear him speak of it before a mixed group of doctors and lawyers at a medicolegal symposium just two months before his death. Anyone genuinely interested in righting whatever may be wrong in the anathema of malpractice might well recall, in supplement to the advice in the book, his words of that day: "When every physician cares for every patient in such a way that the patient is satisfied, there will be no malpractice claims". (Report of Law Department, American Medical Association, on Medicolegal Symposiums, 1955, page 19).

BEN F. SMALL
Indiana University School of Law
Indianapolis, Indiana

ENOCH H. CROWDER. *By David A. Lockmiller. Columbia, Missouri: The University of Missouri. 1955. $5.00. Pages 286.*

One of the outstanding military lawyers in the history of this country was Enoch H. Crowder, the subject of a recently published biography by the historian, lawyer and college president, David A. Lockmiller. While other American lawyer-soldiers such as Joseph Holt, the one-time Secretary of War, Postmaster General and Civil War Judge Advocate General, or the brilliant scholar, G. Norman Lieber, or George B. Davis, illustrious writer on international law, also merit biographical study as complete as this work, it is certainly true that Dr. Lockmiller pays tribute by his book to a man who has long deserved it.

Missouri-born Enoch H. Crowder rose through the ranks of the military hierarchy to become a major general and serve for three consecutive four-year terms as The Judge Advocate General of the Army. During World War I he occupied the posts of Judge Advocate General and Provost Marshal General at the same time. This would be achievement enough for most men, but Eert Crowder went far beyond. He was legal adviser to the military governor in our early days in the Philippines; observer in the Russian-Japanese War; creator and administrator of the Selective Service Act which drafted several millions of American men into military service in World War I; and peace-maker extraordinary and eventually ambassador to the then struggling new Republic of Cuba. The 286 pages of Dr. Lockmiller's easily read biography of General Crowder provide but a brief summary of the life of a fantastically busy man.

This is not a book about courts martial or military justice, although there are some passages dealing with the Ansell-Crowder disagreements arising out of the "reform" movement following the first World War.

Neither is this a book dealing with the private life of General Crowder, for, as the author indicates in his references, there was very little of this material available for research. Crowder was a life-long bachelor whose principal extracurricular activities seemed to consist of enjoying an occasional martini, an ever-present cigar and a friendly poker game. There was not much of the colorful in his make-up.

The book does describe, however, a man of enormous energy, a day-to-day plugger, thorough in all he did, making up for whatever he may have lacked in brilliance by an almost superhuman capacity for work. In personality he was a thin, dry, testy, almost ascetic man, not above petty grudges and bickering, capable of making enemies and incapable of finding and sharing much affection with his fellow men. Above all, however, he was a man of great effectiveness, the kind who could complete the job, *any* job, assigned to him, in the most efficient manner for those he represented.

Dr. Lockmiller employs a style of composition that clearly indicates the researcher in him. His story is told in a chronological, factual manner, omitting both literary ornamentation and long-winded technical discourses. The author's method gives the reader a framework of facts and leaves him relatively free to analyze these facts, draw the necessary conclusions, and contemplate the lessons to be learned from the study of the life of a notable public servant of the recent past.

Present-day judge advocates will regret that there is so little having to do with military law in Dr. Lockmiller's book and there is unfortunately very little description of the work of the Judge Advocate General's Department in those days of Crowder's military service.

The author does, however, demonstrate General Crowder's role as an outstanding administrator, a competent drafter of codes and statutes, and a successful negotiator between military occupation authorities and the representatives of occupied governments. One cannot help but admire the skill of a man who could with equal facility design an election law, compose a code of criminal procedure, initiate penal reforms for military prisons, make substantial international law contributions to a conference of nations of the Western Hemisphere and—in a remarkable twenty-four hour period—prepare the draft of the first truly effective Selective Service law.

Dr. Lockmiller's book, the result of much research, will help to preserve the identity of this man who contributed so much to his country in almost exactly a half century of service.

GEORGE S. PRUGH, JR.
Major, J.A.G.C., U.S.A.
Washington, D. C.

"FULL AID" INSURANCE FOR THE TRAFFIC VICTIM. *By Albert A. Ehrenzweig. California (Berkeley*

and Los Angeles): University of California Press, 1954. $2.00. Pages 72.

Professor Albert A. Ehrenzweig, of the University of California, in his latest work *"Full Aid" Insurance for the Traffic Victim,* challenges the insurance industry with perhaps the best and most logical approach to the problem of what to do about compensating the traffic victim whether negligent or innocent. His concise and direct treatise is extremely well documented, his objectives laudable and his treatment of the subject moderate. Professor Ehrenzweig's treatise is the latest contribution to the problem that recently has seen Justice Samuel H. Hofstadter urge a system similar to that employed in workmen's compensation cases, New York state finally adopting a system of compulsory insurance, New Jersey creating an uncompensated victims' fund, and a growing clamor to do something about the terrific case loads now existing in many of our courts, state and federal.

The Professor advocates a plan which would relieve any motorist carrying insurance from his common law liability for ordinary, not criminal negligence, and thereby proclaiming the doctrine of "negligence without fault". He would eliminate questions of contributory negligence, subrogation rights, third party actions, comparative negligence and many other principles and practices of the common law. A scheme of uniform awards based upon the income of the low income family group for death, permanent and temporary disability would be substituted for the present rule of thumb administered by a jury of peers. But everyone would be compensated regardless of his own fault.

Provision is made to compensate the injured by hit-and-run or insolvent drivers—everyone gets an award. As in workmen's compensation, society shall accept the responsibilities of the individual, although in his first postulate he states it would preserve private enterprise by the plan being a voluntary scheme of private insurance with minimum control by the state, both as to underwriting and rating.

The author admits that many cherished rights of the individual would be sacrificed for the public good, especially the right of trial by jury, and for justification falls back on the philosophy of Jeremy Bentham with a quotation from his *Theory of Legislation,* "If insurance is useful in enterprise of commerce, it is not less so in the great social enterprise to which the associates find themselves united as partners".

The concept of being guilty of or liable for negligence without any fault of your own may be questionable on a moral basis in an age that may be witnessing the decline of morals and a rise of materialism, in spite of the highly moral objective of seeing that those killed or maimed by the high powered automobile are properly and certainly awarded compensation. However, the second postulate of the author is that it would preserve the safety incentive and in fact would add incentive toward greater safety. Perhaps, our real fault is the tension of modern-day civilization and we need a solution rather than an assessment of blame against an individual. Certainly with the increase of the number of automobiles on the highways the tension is going to mount rather than decrease.

Professor Ehrenzweig points out that safety will be promoted, the element of gamble in litigation will be eliminated, the insuring public will save needless expense, equal minimum awards can be easily determined and the widest possible coverage will be afforded with voluntary private insurance with minimum control. The adoption of loss insurance as typified by the Warsaw Convention in aviation insurance law, in workmen's compensation law, the first aid provisions of the standard policy and other milestones prove, in the words of the author, that a sensible and similar plan is possible in the largest field of all, the automobile liability field.

The reviewer acknowledges his ineptness in commenting upon a revolutionary plan so clearly and ably set forth by this outstanding scholar and expresses no view pro or con thereon. On one thought he can agree—that the insurance industry is facing a vital challenge and a mounting demand for an over-all solution wherein justice to the injured can be more fairly and quickly achieved and whether the solution will come from an enlightened and progressive treatment by private enterprise, or by statism, or by a middle ground as advocated by Professor Ehrenzweig and others only time and rigid courage will determine. Certainly before the adoption of any such panacea as that proposed consideration must be given to the sacrifices entailed and whether or not any scheme is worked out the rights, privileges and responsibilities of the individual must be safeguarded. We must make certain that negligence without fault, if necessary in the insurance field, does not permeate other façades of our national morality and accountability for one's actions in an area of freedom of action under the law shall remain a cardinal principle of accepted conduct. From any viewpoint the scholarly, authentic "Full Aid Insurance" deserves the careful study of everyone concerned with the increasing traffic problem and is a fine contribution to the literature on the subject.

EDWARD W. KUHN
Memphis, Tennessee

THE THREE TRIALS OF OSCAR WILDE. *By H. Montgomery Hyde. New York: University Books, Murray Printing Company. 1956. $5.00. Pages 384.*

A series of three sensational criminal trials are edited and authentically reported, involving charges of sodomy against Oscar Wilde, the brilliant poet, author and playwright, whose public accuser was none other than the famous Marquis of Queensberry, the amateur boxer known now for his rules of the sport. Although dating back to London in 1895, the verbatim transcript

is presented in a fashion that will hold the interest of the modern American lawyer.

Many books have been written by partisans, explaining, condemning or criticising the conduct of the litigation and the results. Mr. Hyde presents an unbiased and factual report of the proceedings, documenting in the footnotes and appendices authentic references collected over the years from close friends or actual participants in the trials. A brief foreword is written by Sir Travers Humphreys, the only living participant, whose father was acting solicitor for Oscar Wilde and who himself acted as junior to Wilde's counsel. Sir Travers Humphreys states unequivocally that after hearing the evidence, all present were convinced that the jury's verdict of guilty of indecency with other males was correct; and that both Oscar Wilde and his friend, Lord Alfred Douglas (son of the Marquis of Queensberry), had lied to their solicitor in their protestations of innocence.

The flyleaf states that the book will be of interest to lawyers, doctors, psychoanalysts and penologists by reason of the subject matter and commentaries on a social problem that has confounded humanity for countless ages. The interest of the average trial lawyer is sparked, not by the subject of homosexuality, but by the trial planning, strategy, skillful maneuvers, concise direct examination and searching cross-examination. Great lawyers crossed swords in this *cause célèbre*, confronted in cross-examination by a brilliant witness. The momentous decisions facing counsel in the handling of witnesses, gauging the effect of testimony on a jury, and conduct of trial were much the same as trial lawyers encounter today.

The author deserves credit for producing a verbatim transcript of the testimony in readable form by summarizing and paraphrasing the tedious portions in brackets. In denying illicit relations with one male witness, on cross-examination the defendant, Wilde, made a slip of the tongue by describing the witness as "ugly". All his literary genius and forceful command of the English language were unavailing to explain why he had connected his denial with the witness' lack of physical beauty. Likewise, his explanations of fellowship had a hollow ring in response to the constant question of what pleasure a man of his culture and refinement could find in his intimate nightly association with unlettered lackeys and servants twenty years his junior.

Mr. Hyde furnishes an appropriate background for an understanding of the transcript of the testimony with a ninety-two-page introduction, written in a factual and nonargumentative fashion. The first trial was precipitated by the Marquis of Queensberry, who became suspicious of the relations between his son, aged 22, and Oscar Wilde, aged 38. The Marquis strenuously objected to the association, and after several unsuccessful attempts to break it up, he deliberately wrote a libelous note to Wilde. This left Wilde two courses of action: he could ignore the note and be left publicly branded as "posing as a sodomite", or he could prosecute the Marquis for criminal libel. Unwisely, he chose the latter course. Upon being confronted with unexpected damaging testimony, Wilde's counsel determined in the middle of the trial to drop the libel charges against the Marquis in the hopes of forestalling an indictment against Wilde for acts of indecency with members of his own sex. Wilde's counsel advised him to leave the country for awhile, but he ignored this advice. He was arrested, and his first trial jointly with his procurer of male prostitutes resulted in a disagreement of the jury. Wilde handled himself admirably in answering embarrassing questions with literary and artistic explanations, but on the second trial both he and his accomplice were convicted separately. The two-year prison term completely broke Wilde's spirit. Upon his release, he went to Paris where he took up his old habits and died in the gutter.

Thus ends a lawyer's interest in the tripartite drama. For those interested in the problem of homosexuality, the author briefly reviews the conclusions of the bibliography on the subject in the appendix. Whether the practice is viewed as an incurable inborn trait, a psychopathic disease that can be cured by psychiatry or whether it is to be viewed sympathetically and condoned as the addicts urge, the author wisely concludes that the impulse "can be checked by advice and by resolution" and ought to be discouraged by law.

HOWARD COCKRILL
Little Rock, Arkansas

JUDICIAL JINGLES. *By Frank G. Swain, New York: The Pageant Press, Inc. 1955. $3.00. Pages 168.*

Seldom does it become the privilege of one to review the literary effort of an old and respected friend. I first met this distinguished jurist at the Officers' Training Camp when we were enthusiastically endeavoring to fit ourselves to save the world for democracy.

It has been my happy privilege ever since to have watched his illustrious career and to have witnessed his establishing himself as one of the outstanding judges in the West. It is perhaps because of my respect and affection for him that I feel more keenly my inability appropriately to review his work, but judges such as he are most patient and forgiving of the poor craftsmanship of the practitioner. Hence, I have courage to proceed.

Perhaps the greatest fun in reading a contemporaneous humorous work is the sharing with the author his sharp insight into human nature and the foibles of the times. In their day, such famous works as *Gulliver's Travels* and *Alice in Wonderland* so delighted readers. Human nature not changing much, we who read such an older work today find great enjoyment in these portrayals of our fellow men, but unfortunately do not have the intimate knowledge of the times which as-

sured the contemporaneous readers of *Travels* and *Alice* their keen enjoyment. But when a humorous work is written concerning our own behavior as seen through the X-ray eyes of one whose business in life is concerned with judging the acts of individuals as they affect others, we can be sure that we are in for a rare treat.

Such is in store for all who pick up *Judicial Jingles*, a collection of short verses best described as little gems penned by Frank G. Swain, Judge of the Appellate Department of the Los Angeles County Superior Court. Judge Swain has sat on the bench for more than a score of years and was a lawyer for many more. His wide experience includes criminal as well as civil trials and appeals. He presides in a county which boasts of Hollywood and so has had his share of famous personalities before his bench. Two of his most humorous verses are "Starlets in Court" and "The Morality Clause". Outside the courtroom he makes some pungent observations on Hollywood in "A Break for Eartha", "That Hollywood Fountain of Youth", "A Hollywood Wedding" and others.

Judge Swain appears to be the first jurist to place under the close scrutiny of judicial verse the gamut of quirks and deficiencies of our legal system. So lawyers and others critical of the practice of electing judges will nod knowingly as they smile over "A Mellowing Judge". The defects of our jury system are sharply etched in "Selecting a Jury", "The Life of the Jurors", "Modern Jury Instructions" and "The Bounds of Knowledge". One of his wonderful verses, "An Aging Judge" neatly points up the problem of the superannuated jurist. The problem of the poor plaintiff and the rich corporation is illuminated in "An Appellate Problem", where we discover that it is negligence per se to be a railroad. The lawyers predilection to practice law by ear is examined in "Why Work? Just Call the Clerk".

The Judge even has fun with himself. "Skipper Comes to Court", which very properly begins the book, and which concerns the unabashed visit of a little boy to his beloved grandfather's court, will greatly amuse Los Angeles lawyers who have appeared before his Honor or know of his Honor's reputation. Judge Swain is widely known as a judge exceedingly stern with lawyers.

The Judge's humor and his priceless analysis of human nature and our times are not confined, however, to the courtroom and "Matters Judicial". More than half of the chuckles are contained in Chapter II dealing with "Matters Extra-Judicial". Here among others are found his observations while traveling abroad, camping and fishing, on fat women, grandchildren and the Walter Mitty in all of us.

The greatest moments of drama often occur in a humorous play when, after the author has succeeded in getting his audience to laugh uproariously, the mood is switched to pathos. Judge Swain achieves this effect by striking a serious note in "A Judge's Soliloquy", which closes Chapter I and which portrays the troubled mind and heart of a criminal judge as he views the prisoner while pondering sentence.

Finding that judges are able to laugh at themselves, the legal profession and system, and the world around them is very reassuring. But best of all, it is good just to be able to sit down with this book and enjoy a series of hearty belly laughs, "the most delightful reading of the year". Here is a representative shorter verse:

THE LAWYERS' LAMENT

Irrefuti, J. J., have now spoken;
The law is unsettled, alas!
What we thought was rock-ribbed terra firma
Is now just a quaking morass.

LOYD WRIGHT

Los Angeles, California

GEORGIA FAYE. *By Lowell M. Greenlaw. New York: Exposition Press, Inc. 1955. $5.00. Pages 614. (including index).*

It must be accounted as an accomplishment of some stature for one to write a 600-page book about his wife. But to do so with an eye to engrossing detail, an ear for the softly beguiling and a feeling of engaging charm and humility is a major achievement.

This is what Mr. Greenlaw, who until his retirement in 1950 was Vice President and General Counsel of the Pullman Company, has done.

The Georgia Faye of the title is the Georgia Faye Harrison Mr. Greenlaw married in 1903 at Flora, Illinois, and who died in Chicago a few days before her 66th birthday. Between those dates Georgia Faye and Lowell lived a full life, raised a family and cherished the love and respect of one for the other. During this time Lowell went to work for Pullman in 1908, studied and successfully passed his bar examination in 1912 and rose to prominence in his profession.

Mr. Greenlaw tells his story in the third person; it is not "I" but "Lowell". His story is of necessity somewhat autobiographical, but the reader never forgets that it is really Georgia Faye's life and love serenade he is reading. Lowell may refer to some legal problem with which he was involved almost by inadvertence, to immediately rush back to the side of Faye.

Besides being a warm and endearing personal testimony, Mr. Greenlaw's book gives one an exciting insight into the social history of the last sixty or so years.

RICHARD B. ALLEN

Aledo, Illinois

Review of Recent Supreme Court Decisions

George Rossman
EDITOR-in-CHARGE

Citizens . . . *denaturalization*

■ *United States* v. *Zucca*, 351 U.S. 91, 100 L. ed. (Advance p. 539), 76 S. Ct. 671, 24 U.S. Law Week 4232. (No. 213, decided April 30, 1956.) *On writ of certiorari to the United States Court of Appeals for the Second Circuit. Affirmed.*

In this denaturalization proceeding, the sole question was whether Section 340 (a) of the Immigration and Nationality Act of 1952 makes the filing of an "affidavit showing good cause" a prerequisite to maintenance of the suit.

Zucca had been naturalized in 1944. The complaint alleged that at the time he had concealed his membership in the Communist Party and had wilfully misrepresented his intentions and beliefs. The complaint was not alleged on information and belief but was verified by an Assistant United States Attorney. No "affidavit showing good cause", required by the literal language of Section 340 (a), was submitted. The Government argued that the affidavit requirement of the statute applied only when the proceeding is brought upon the complaint of a private citizen.

The CHIEF JUSTICE, speaking for the Court, affirmed dismissal of the complaint. The Court said that Congress had established the requirement of an affidavit to protect naturalized citizens and that the fact that the complaint itself was verified was not enough. The complaint, said the Court, is required merely to allege ultimate facts, while the affidavit must set forth evidentiary matters showing good cause for a cancellation of citizenship. Such a safeguard should not be lightly disregarded, save on a "very clear showing" that Congress meant something other than what it said.

Mr. Justice HARLAN took no part in the consideration or decision of the case.

Mr. Justice CLARK, joined by Mr. Justice REED and Mr. Justice MINTON, wrote a dissenting opinion which took the view that the Court was reversing "a long line of cases in the lower federal courts" and was disregarding a consistent administrative practice of over thirty years' standing. The decision placed an "extreme burden" on the Government in cases such as this, the dissent argued, and might well submerge the denaturalization procedure in a "morass of unintended procedural difficulties".

The case was argued by J. F. Bishop for petitioner and by Orrin G. Judd for respondent.

Communications . . . *rule making*

■ *United States* v. *Storer Broadcasting Company*, 351 U. S. 192, 100 L. ed. (Advance p. 613), 76 S. Ct. 763, 24 U. S. Law Week 4256. (No. 94, decided May 21, 1956.) *On writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Reversed and remanded.*

This was an action to prevent a change in the rules of the Federal Communications Commission so as to further limit the number of broadcasting stations that the respondent might own. Respondent owned or controlled seven AM radio stations, five FM radio stations and five television stations. The respondent argued that the limitations would cause irreparable financial damage to owners of AM radio stations if an obsolescent station could not be augmented by FM and television facilities. On the same day, the Commission denied respondent's application for a new TV station and entered an order amending the rules in question, over the respondent's objections; the Court of Appeals struck out some of the language in the amendments and remanded the case to the Commission.

Mr. Justice REED, speaking for the Supreme Court, reversed and remanded. The Court first discussed the respondent's standing to bring its action, concluding that the rule-making was complete and did aggrieve the respondent, which was unable to enlarge the number of stations it held, and, since the revised rules considered ownership of more than one per cent of a broadcasting corporation as constituting "ownership", respondent faced the prospect of having its licenses jeopardized at any time as a result of the transfer of some of its stock which was in public hands and not controlled by the present management. The Court concluded, however, that the Commission's multiple ownership rules could be reconciled with the statute. The requirement of a "full hearing" said the Court, did not mean that the Commission had to waste time on applications that did not state a valid basis for a hearing.

Mr. Justice DOUGLAS concurred in the result.

In a separate opinion, Mr. Justice HARLAN declared that he concurred in the Court's holding that it should determine *sua sponte* the jurisdiction of the Court of Appeals, but his view was that the respondent was not a "party aggrieved by a final order" of the Commission and hence was not entitled to invoke the jurisdiction of the courts. The order, in this view, was merely a set of standards to be followed by the Commission and determined no questions of legal status.

Mr. Justice FRANKFURTER wrote a short dissenting opinion in which he

Reviews in this issue by Rowland Young.

agreed with the Court that the multiple ownership rule was a "reviewable order" of the Commission, but agreed with Mr. Justice HARLAN that the respondent had not been aggrieved by the order.

The case was argued by Warren E. Baker for petitioner and by Albert R. Connelly for respondent.

Communism . . . *registration*

■ *Communist Party of the United States* v. *Subversive Activities Control Board*, 351 U.S. 115, 100 L. ed. (Advance p. 554), 76 S. Ct. 663, 24 U.S. Law Week 4224. (No. 48, decided April 30, 1956.) *On writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Reversed and remanded.*

The perjury of three of the Government's key witnesses has enabled the Communist Party, at least temporarily, to further avoid registering under the provisions of the Internal Security Act of 1950.

Acting under Section 13 (a) of the statute, the Attorney General petitioned the Subversive Activities Control Board to issue an order directing the Communist Party to register under the act. After hearings, the Board found that petitioner was a Communist-action organization, as defined by the statute, and ordered it to register as such. On review by the Court of Appeals, petitioner moved for leave to introduce new evidence which, it was contended, would establish that three of the witnesses at the earlier proceedings had committed perjury and were completely untrustworthy. The Government did not deny the allegation, but replied that, even apart from the testimony of the three witnesses, the findings of the Board were amply supported by the evidence. The Court of Appeals denied the motion, holding that the findings of the Board had been established by a preponderance of the evidence.

Mr. Justice FRANKFURTER delivered the opinion of the Supreme Court which reversed and remanded. The Court's decision failed to reach the constitutional questions raised by the petitioner, since it held that the Court of Appeals erred in refusing to return the case to the Board for consideration of the new evidence as to perjury of the three key-witnesses. The Court noted that the direct testimony of witness Crouch occupied 387 pages of the typewritten transcript, that of witness Johnson 163 pages and that of witness Matusow 118 pages. "When uncontested challenge is made that a finding of subversive design by petitioner was in part the product of three perjurious witnesses, it does not remove the taint for a reviewing court to find that there is ample innocent testimony to support the Board's findings" the Court declared. The Court remanded the case "to make certain that the Board bases its findings upon untainted evidence".

Mr. Justice CLARK wrote a dissenting opinion in which Mr. Justice REED and Mr. Justice MINTON joined. The view taken here was that the evidences of perjury were "flimsily supported" and that the Court was disregarding its "plain responsibility and duty" to decide the important constitutional issues. "If all or any part of the Act is unconstitutional it should be declared so on the record before us" said the dissent. "If not, the Nation is entitled to effective operation of the statute deemed to be of vital importance to its well-being at the time it was passed by the Congress."

The case was argued by John J. Abt and Joseph Forer for petitioner and by Solicitor General Simon E. Sobeloff for respondent.

Constitutional law . . . *due process*

■ *Covey* v. *Town of Somers*, 351 U.S. 141, 100 L. ed. (Advance p. 570), 76 S. Ct. 724, 24 U.S. Law Week 4247. (No. 380, decided May 7, 1956.) *On appeal from the Court of Appeals of New York. Reversed and remanded.*

Article VII-A, Title 3, of the New York Tax Law provides for the judicial foreclosure of tax liens on real property. Provision is made for notice by publication, by posting and by mailing. Unless the taxes are paid within seven weeks or an answer interposed within twenty days thereafter, the statute provides for foreclosure and a conveyance of the estate in fee simple absolute to the taxing district. The deed is presumptive evidence of the regularity of the proceedings for two years, after which the presumption becomes conclusive.

In 1952, the Town of Somers instituted this proceeding against a parcel of real property owned by one Nora Brainard, an incompetent. Notice was served on her and, no answer having been made within the prescribed period, a judgment of foreclosure was entered on September 8. On October 24, a deed to her property was delivered to the town. Five days later, Nora Brainard was certified to be a person of unsound mind and was committed to an insane asylum. Her attorney then sought to have the foreclosure judgment vacated and the deed set aside, arguing that Nora Brainard was known to the town officials to be an incompetent and that the statutory notice was therefore insufficient in her case.

The trial court found that there had been no deprivation of constitutional rights and denied the motion to vacate the foreclosure judgment. The denial was affirmed by the Appellate Division and by the Court of Appeals.

The Supreme Court of the United States reversed, speaking through the CHIEF JUSTICE. Assuming that the facts were as disclosed by the uncontroverted affidavits filed with the motion, the Court noted that Nora Brainard had lived alone, had no relative in the State of New York nor any other person to act in her behalf, and that, despite the fact that she had been known to be an incompetent for fifteen years, the town had made no attempt to have a committee appointed for her person or property until after the entry of the judgment of foreclosure. The

taking of her property in the circumstances, the Court declared, did not measure up to the requirements of due process.

Mr. Justice FRANKFURTER, in a separate opinion, argued that the basis for the Court of Appeals' holding on the constitutional point was not clear, and that the basis of its judgment might have rested on the running of the statute of limitations.

The case was argued by Samuel M. Sprafkin for appellant and by Otto E. Koegel for appellee.

Courts . . . *criminal procedure*

■ *In the Matter of the Application of Burwell,* 350 U. S. 521, 100 L. ed. (Advance p. 428), 76 S. Ct. 539, 24 U. S. Law Week 4165. (Nos. 736 and 737, decided April 2, 1956.) *Certificate from the United States Court of Appeals for the Ninth Circuit. Dismissed.*

This was a certificate from the Court of Appeals for the Ninth Circuit raising questions about the power of a court of appeals to grant certificates of probable cause under 28 U.S.C. §2253.

In a short *per curiam* opinion, the Supreme Court dismissed the certificate, declaring that it would not attempt to lay down a procedure for a court of appeals to follow in entertaining applications for certificates of probable cause. The opinion declared that "It is not for this Court to prescribe how the discretion vested in a Court of Appeals, acting under 28 U.S.C. §2253, should be exercised."

Criminal law . . . *income tax evasion*

■ *Berra* v. *United States,* 351 U. S. 131, 100 L. ed. (Advance p. 563), 76 S. Ct. 685, 24 U. S. Law Week 4221. (No. 60, decided April 30, 1956.) *On writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Affirmed.*

The problem in this case was the result of the fact that the same conduct is punishable under both Section 145 (b) and Section 3616 (a) of the Internal Revenue Code of 1939. Section 145 (b) provides punishment for "Any person . . . who willfully attempts . . . to evade or defeat" his income taxes and carries a maximum penalty of $10,000 or five years' imprisonment, while Section 3616 (a) makes it unlawful for any person to deliver to the Collector "any false or fraudulent . . . return" and carries a penalty of a $1,000 fine or one year's imprisonment.

Berra was charged on three counts with evading his federal income taxes for 1951, 1952 and 1953. The District Court refused to instruct the jury that it could render a verdict of guilty of the "lesser crime" under Section 3616 (a) on each count. The jury convicted, and Berra was sentenced to four years' imprisonment on each count. The Court of Appeals affirmed on the theory that Section 3616 (a) did not apply to income tax returns, so that the requested instruction would have been irrelevant.

Speaking through Mr. Justice HARLAN, the Supreme Court affirmed on the theory that the function of the jury was limited to the factual issues and that the question which section of the Code was to govern was one of law for the court. "When the jury resolved those issues against petitioner" said the Court, "its function was exhausted, since there is here no statutory provision giving to the jury the right to determine the punishment to be imposed after the determination of guilt."

Mr. Justice BLACK wrote a dissenting opinion in which Mr. Justice DOUGLAS joined. The dissent argued that, since Congress had specifically made the conduct charged a misdemeanor in Section 3616 (a), the statute should be narrowly construed and prosecution for a felony barred.

The case was argued by Stanley M. Rosenblum for petitioner and by Philip Elman for respondent.

Eminent domain . . . *batture*

■ *General Box Company* v. *United States,* 351 U. S. 159, 100 L. ed. 582, 76 S. Ct. 728, 24 U. S. Law Week 4240. (No. 383, decided May 7, 1956.) *On writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Affirmed.*

This was an action to recover from the United States the value of timber destroyed in the process of building a levee on the Mississippi.

The timber in question was growing upon land located between the low- and high-water marks of the river. Such land, known as "batture", is subject to a servitude of the state for use in building levees and may be used for that purpose without payment of compensation to the owner. The levee, part of the federal flood control plan, was to be built by the Federal Government, with Louisiana agreeing to furnish the necessary rights of way "without cost". The government contractor began to clear the batture on July 22, 1947, without giving notice of its intention to bulldoze the petitioner's trees out of the area. Petitioner brought suit under the Tucker Act and recovered a judgment against the United States. The Court of Appeals reversed.

The Supreme Court affirmed, speaking through Mr. Justice REED, holding the United States not liable. The Court reasoned that Louisiana had donated its right to destroy the timber without prior notice to the United States.

It was conceded that under Louisiana law, the state had a riparian servitude for constructing and repairing the levees and that the owner was required to permit the state to use the property for that purpose without compensation. The Court had some difficulty with the problem of notice, since there was no state decision directly in point, but it relied on the Court of Appeals' determinations of state law.

Mr. Justice FRANKFURTER concurred but remarked that it is a "precarious business" for the Court to attempt to determine state law in the absence of state authorities. He would suspend judgment on the notice question until there had been a state court determination of the issue.

Mr. Justice DOUGLAS, joined by

Mr. Justice HARLAN, wrote a dissenting opinion. This opinion argued that the question of notice of intention to exercise the state's rights in the batture was in the "penumbra" of Louisiana law, and that the trial judge, who had practiced law in Louisiana and had been a member of its Supreme Court, was correct.

The case was argued by Edward Daniel Moseley and Ross R. Barnett for petitioner and by S. Billingsley Hill for respondent.

Labor law . . . *company records*

■ *National Labor Relations Board* v. *Truitt Manufacturing Company*, 351 U. S. 149, 100 L. ed. 575, 76 S. Ct. 753, 24 U. S. Law week 4245. (No. 486, decided May 7, 1956.) *On writ of certiorari to the United States Court of Appeals for the Fourth Circuit. Reversed.*

In this case, the union had asked for a wage increase of ten cents an hour for the employer's workers. The company replied that it could not afford an increase of more than two and a half cents an hour, but it denied the union's request to look at the books, arguing that the union had no legal right to such information.

The National Labor Relations Board found that the company had failed to bargain in good faith. The Court of Appeals refused to enforce the Board's order, agreeing with the company that it was not an unfair labor practice to refuse to furnish information about the company's finances.

Mr. Justice BLACK, speaking for the Supreme Court, reversed. Good-faith bargaining, reasoned the Court, requires that claims made by either bargainer should be honest. Here, the employer had made repeated statements about inability to pay an increase in wages without making the slightest effort to substantiate the claim. Under the facts, the Court said, the Board could reasonably conclude that the Company was guilty of an unfair labor practice. The Court added, however, that each case must turn upon its particular facts as to whether the statutory obligation to bargain has been met.

In a separate opinion, Mr. Justice FRANKFURTER, joined by Mr. Justice CLARK and Mr. Justice HARLAN, agreed that refusal to disclose the books might constitute failure to bargain in good faith, but urged that the Board had misconceived the law. The Board rested its decision, said this opinion, on the sole ground that good-faith bargaining requires the employer to substantiate its economic position. The dissent would have reversed the Court of Appeals and remanded to the Board for further proceedings.

The case was argued by David P. Findling for petitioner and by R. D. Douglas, Jr., for respondent.

Labor law . . . *Railway Labor Act*

■ *Railway Employes' Department, American Federation of Labor* v. *Hanson*, 351 U. S. 225, 100 L. ed. (Advance p. 633), 76 S. Ct. 714, 24 U. S. Law Week 4251. (No. 451, decided May 21, 1956.) *On appeal from the Supreme Court of the State of Nebraska. Reversed.*

This case upheld the validity of the so-called "Union Shop" provision of the Railway Labor Act, 45 U.S.C. §152 Eleventh.

The suit was begun in the Nebraska courts by employees of the Union Pacific Railroad to enjoin a "union shop" agreement between the railroad and the union. The employees were not members of the union and did not want to join the union. Under a union shop agreement, they would be compelled to join the union within sixty days or lose their jobs. They argued that the union shop agreement violated the Nebraska "right to work" statute which prohibits union or closed shops. The Nebraska trial court issued an injunction and its judgment was affirmed by the state's supreme court, which held that the union shop violates the First and Fifth Amendments.

Speaking through Mr. Justice DOUGLAS, the Supreme Court purported to be unable to see a constitutional deprivation of rights. The Court held that the Railway Labor Act's permissive union shop provision establishes a federal policy which supersedes the state law. Granting that state "right to work" laws are constitutional, the Court declared that the state law here must give way to Congress's power to regulate labor relations in interstate industries. As for the constitutional questions argued, the Court said that it was no more an infringement to require a railroad employee to join a union than to require a lawyer to become a member of an integrated Bar. The Court noted that its holding was a narrow one: "We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or Fifth Amendments. We express no opinion on the use of the other conditions to secure or maintain membership in a labor organization operating under a union or closed shop agreement."

Mr. Justice FRANKFURTER's concurring opinion stressed his view that the question was one of policy, which was for Congress to determine.

The case was argued by Lester P. Schoene for appellants and by Edson Smith for appellees.

Labor law . . . *unfair practices*

■ *National Labor Relations Board* v. *Babcock and Wilcox Company*, 351 U. S. 105, 100 L. ed. (Advance p. 547), 76 S. Ct. 679, 24 U. S. Law Week 4229. (No. 250, decided April 30, 1956.) *On writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Affirmed.*

■ *National Labor Relations Board* v. *Seamprufe, Inc.*, 351 U. S. 105, 100 L. ed. (Advance p. 547), 76 S. Ct. 679, 24 U. S. Law Week 4229. (No.

251, decided April 30, 1956.) *On writ of certiorari to the United States Court of Appeals for the Tenth Circuit. Affirmed.*

■ *Ranco, Inc.* v. *National Labor Relations Board,* 351 U. S. 105, 100 L. ed. (Advance p. 547), 76 S. Ct. 679, 24 U. S. Law Week 4229. (No. 422, decided April 30, 1956.) *On writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Reversed.*

The issue here was the use of company-owned parking lots for the distribution of union literature by non-employee union organizers. In each case, the National Labor Relations Board found the employer's refusal to allow such distribution to be an unfair labor practice. In Nos. 250 and 251, the Court of Appeals refused to enforce the Board's order; the Court of Appeals in No. 422 granted enforcement.

The opinion of the Supreme Court was delivered by Mr. Justice REED. The Court held that the employer could post his property against non-employee distribution of union literature, at least if reasonable efforts by the union through other channels would enable it to reach the employees. In these cases, it was apparently possible for the union to deliver its message to the employees by such means as the telephone, letters, or personal contact, and the Court's language indicates that the result might be different in a case where employees are "isolated from normal contacts". The Court gave considerable weight to the fact that the organizers here were not employees. "The Act requires only that the employer refrain from interference, discrimination, restraint or coercion in the employees' exercise of their own rights" the Court concluded. "It does not require that the employer permit the use of its facilities for organization when other means are readily available."

Mr. Justice HARLAN took no part in the consideration or decision of the cases.

The cases were argued by Dominick L. Manoli for the Board and by O. B. Fisher for respondent in No. 250, Karl H. Mueller for respondent in No. 251, and Eugene B. Schwartz for petititioner in No. 422.

Selective Service . . .
venue

■ *Johnston* v. *United States,* 351 U. S. 215, 100 L. ed. (Advance p. 627), 76 S. Ct. 739, 24 U.S. Law Week 4263. (No. 643, decided May 21, 1956.) *On writ of certiorari to the United States Court of Appeals for the Third Circuit. Affirmed.*

■ *United States* v. *Patteson,* 351 U. S. 215, 100 L. ed. (Advance p. 627), 76 S. Ct. 739, 24 U.S. Law Week 4263. (No. 701, decided May 21, 1956.) *On writ of certiorari to the United States Court of Appeals for the Tenth Circuit. Reversed.*

These cases presented the question of proper venue for prosecution of violations of the Universal Military Training and Service Act. In each case, the defendants were conscientious objectors who resided in one federal judicial district and were ordered to report in another judicial district for civilian work in lieu of military service. The Third Circuit held that the proper venue was the district to which they had been ordered to report. The Tenth Circuit had ruled that the proper venue was in the defendant's home district.

Mr. Justice REED, speaking for the Supreme Court, ruled that the Third Circuit was correct, on the theory that the offense was committed in the district where the civil work was to be performed. "We are led to this conclusion" the Court said, "by the general rule that where the crime charged is a failure to do a legally required act, the place fixed for its performance fixes the situs of the crime." The duty violated, the Court pointed out, in each case was the duty to report.

The CHIEF JUSTICE and Mr. Justice BLACK joined in a dissenting opinion written by Mr. Justice DOUGLAS. This opinion argued that the defendants had defied their draft boards at home, not in a distant place, and that the offense was the refusal to obey the draft board's order.

The case was argued by Hayden C. Covington for Johnston and Patteson, and by Carl H. Imlay for the United States.

Taxation . . .
federal immunity

■ *Offutt Housing Company* v. *County of Sarpy,* 351 U.S. — , 100 L. ed. (Advance p.), 76 S. Ct. , 24 U. S. Law Week 4267. (No. 404, decided May 28, 1956.) *On writ of certiorari to the Supreme Court of Nebraska. Affirmed.*

This case raised again the always troublesome problem of state taxes levied upon property owned by the Federal Government. Petitioner, a Nebraska corporation, held an Air Force contract for the construction and operation of a housing project for airmen stationed at Offutt Air Force Base in Nebraska. The corporation was granted a 75-year lease on federal land and agreed to build and service the project. The Government retained title and provided fire and police protection. Units of the project were to be leased to military and civilian personnel designated by the commanding officer of the Base at maximum rents specified by the Federal Housing Administration and the Air Force. The District Court of Sarpy County held that, since the title to the buildings and improvements was in the United States, the corporation was not required to pay state and county "personal property" taxes. The state supreme court reversed, holding that some $825,685 worth of furniture, fixtures, tools and equipment was subject to the tax.

Mr. Justice FRANKFURTER delivered the opinion of the Supreme Court affirming the validity of the imposition.

The Court rested its holding on the Wherry Military Housing Act of 1949, under which the project was constructed, and the Military Leasing Act of 1947, reading the statutes together to determine congressional intent. In concluding that Congress

had consented to the imposition of local taxes, the Court admitted that the light thrown on the question by the statutory language was "flickering and feeble". "We do not hold that Congress has relinquished this power over these areas" declared the Court. "We hold only that Congress, in the exercise of this power, has permitted such state taxation as is involved in the present case." The Court was not impressed with the corporation's contention that it was merely a "managing agent" for the Government, saying that this was only an attempt to use a phrase to make the facts fit an abstract legal category.

Mr. Justice DOUGLAS wrote a dissenting opinion in which he was joined by Mr. Justice REED, Mr. Justice BURTON and Mr. Justice HARLAN. The dissent argued that the inter-relationship of the Wherry Act and the Leasing Act was "very limited" and that the legislative history of the former did not indicate that Congress intended to permit any local taxation. Moreover, this opinion thought that the Government's interest in the project was far from nominal, and that "managing agent" was an apt term to describe the corporation's function.

The case was argued by Robert L. Stern for petitioner and by Dixon G. Adams and Orville Entenman for respondents.

Taxation . . .
stock options

▪ *Commissioner of Internal Revenue* v. *Lo Bue*, 351 U.S. 243, 100 L. ed. (Advance p.), 76 S. Ct. , 24 U. S. Law Week 4271. (No. 373, decided May 28, 1956.) *On writ of certiorari to the United States Court of Appeals for the Third Circuit. Reversed and remanded.*

The taxation of stock option transactions is always a vexing problem for the courts. In this case, the Supreme Court overruled both the Tax Court and the Court of Appeals in holding that stock options granted to an employee to give him a proprietary interest in the business nevertheless represented taxable income to him.

LoBue was one of the company's employees who received nontransferable options to purchase the company's stock at prices substantially lower than its market value. In all, he received $9,930 worth of stock for $1,700. The Company deducted the difference of $8,230 as an expense, but LoBue did not report it as income. The Commissioner assessed a deficiency. The Tax Court held that there was no taxable income because the options were not intended by the company to be additional compensation but were granted to enable the petitioner to acquire a propriety interest in the firm. The Court of Appeals affirmed.

Speaking for the Supreme Court, Mr. Justice BLACK held that the taxpayer had realised taxable gain when he purchased the stock. The Court took the view that Congress intended to tax all gains except those specifically exempted. The only possible exemption that could cover LoBue's case, the Court went on, was the gift exemption, and there was not the slightest indication that the stock transfers here were intended as gifts. "They were made by a company engaged in operating a business for profit, and the Tax Court found that the stock option plan was designed to achieve more profitable operations by providing the employees 'with an incentive to promote the growth of the company by permitting them to participate in its success' " the Court observed. The Court could find nothing in Section 22 (a) of the 1939 Code to narrow the concept of the word "income" so as to exclude this award of stock options.

Mr. Justice HARLAN, joined by Mr. Justice BURTON, concurred in part and dissented in part, taking the view that the taxable event was the grant of the option, not the purchase of the stock by the employee.

Mr. Justice FRANKFURTER and Mr. Justice CLARK noted that they joined in the judgment and opinion of the Court on the main issue, but they expressed the view that the Court should abstain from passing on the question when the taxable event took place, a point not in issue before either of the courts below.

The case was argued by Philip Elman for petitioner and by Richard F. Barrett for respondent.

United States . . .
Indians

▪ *Hatahley* v. *United States*, 351 U. S. 173, 100 L. ed. (Advance p. 590), 76 S. Ct. 745, 24 U.S. Law Week 4237. (No. 231, decided May 7, 1956.) *On writ of certiorari to the United States Court of Appeals for the Tenth Circuit. Reversed and remanded.*

In this case, the United States was held liable for damages for the destruction by federal agents of horses belonging to eight families of Navajo Indians.

The Indians were residents of San Juan County, Utah. Wards of the Government, they derive their living entirely from their animals, what little corn they can grow, and the wild game and pine nuts that the land affords. The evidence indicated that there was conflict between the Indians and white settlers in the neighborhood, and in 1950, white livestock operators began legal action to remove the Indians from the area. In 1952, the Department of Interior range manager began to prosecute a vigorous campaign to round up and destroy the Indians' horses. This campaign was conducted under Utah's abandoned horse statute which authorizes the elimination of "abandoned" horses on the open range. Some 115 horses and 38 burros belonging to petitioners were taken and destroyed. The District Court, finding that the horses were essential to the petitioner's existence, awarded damages of $100,000. The Court of Appeals reversed on the theory that the government agents' actions were authorized by the Utah statute.

The Supreme Court reversed, speaking through Mr. Justice CLARK. The Court said that unlawful graz-

ing on the federal range was covered by the Federal Range Code, which provides for written notice to the owner before the livestock can be seized. No such notice was given here. The Court disagreed with the Court of Appeals which had found no inconsistency between the federal regulation and the Utah abandoned horse statute, since the latter is directed, not at ownerless horses but at horses "at large on the open range" without brands and upon which taxes have not been paid. It was plain from the record, the Court said, that the federal agents knew that the horses belonged to the petitioners, and that the state statute had been applied discriminatorily against the Indians.

In holding the Government liable for the damages under the Tort Claims Act, the Court noted that the federal officers here had been acting within the scope of their employment and the fact that they did not in fact have actual authority for the procedure they used did not affect liability. "There is an area, albeit a narrow one, in which a government agent, like a private agent, can act beyond his actual authority and yet within the scope of his employment."

The case was argued by Norman M. Littell for petitioners and by Roger P. Marquis for respondent.

Report of Board of Governors on Proposal To Establish a Section of Negligence and Workmen's Compensation Law

■ Notice is hereby given by the Board of Governors, in accordance with Article IX, Section 2 of the By-Laws of the Association, that there has been filed with the Secretary a proposal to establish a Section of the Association on Negligence and Workmen's Compensation Law and that at its meeting on February 17, 1956, the Board voted to recommend to the House of Delegates that such a Section be established.

Statement of the need for the proposed new Section was presented by Paul W. Updegraff of Oklahoma, representing 462 members of the Association who petitioned therefor and who stated they would enroll as members and pay the Section dues of $5.00 per year. Attention was directed to the predominance of personal injury cases on our court dockets and to the fact that there are over two and a half million cases of industrial accidents each year involving Workmen's Compensation and Employers' Liability. It was urged that there is a great need within the organization of the Association for a forum for the free exchange of ideas on these subjects, a need which is not presently being filled by the Section of Insurance Law which, although concerned with the subjects, represents primarily the point of view of the defendant or the employer. It was pointed out also that the establishment of such a Section would make membership in the Association more attractive to the thousands of lawyers engaged in this type of practice and would provide the opportunity to exercise supervision over them.

There was also presented to the Board the recommendation of the Committee on Scope and Correlation of Work that the proposed Section be established, that recommendation calling attention to the fact that the Association's failure to have such a Section at the present time has been responsible for the refusal of many lawyers specializing in the handling of plaintiffs' cases to support the work of the Association. It was the opinion of the committee that substantial interest has been shown in the establishment of the Section and that it will serve to increase Association membership.

The Board also heard arguments opposing the proposed new Section from George E. Beechwood, of Pennsylvania, Section Delegate of the Section of Insurance Law, who contended that the proposed jurisdiction of the new Section would trespass upon fields of the law now clearly within the jurisdiction of the Insurance Section. He particularly pointed out that for many years the Section has had a committee on Workmen's Compensation and Employers' Liability Insurance Law.

It was the conclusion of the Board: (1) that there had been compliance with the requirements of Article IX, Section 1 of the By-Laws of the Association; (2) that there will be no substantial conflict between the contemplated jurisdiction of the proposed new Section and the existing Section of Insurance Law and (3) that the proposed new Section should be established and the Board so recommends to the House of Delegates. The Board notes particularly the tendency in recent years of lawyers practicing in particular fields to form their own associations and expresses the belief that the profession should be encouraged to unite within the American Bar Association rather than to split into independent groups.

What's New in the Law

The current product of courts, departments and agencies

George Rossman • EDITOR-IN-CHARGE

Richard B. Allen • ASSISTANT

Civil Procedure . . . *actions*

▪ The Supreme Court of Illinois, with one judge dissenting, has ruled that a provision of the state's wrongful-death act prohibiting suits on out-of-state deaths violates the federal-supremacy clause of the Constitution.

The Illinois statute provides "that no action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place".

The death occurred in Indiana and the decedent and his personal representative were Indiana residents. The action was brought under the Federal Employers' Liability Act in an Illinois state court.

Citing *Hughes* v. *Fetter*, 341 U.S. 609, and *First National Bank of Chicago* v. *United Air Lines*, 342 U.S. 396, the Court held that a state cannot refuse to entertain wrongful-death actions which originate under the laws of a sister state, if the state of the forum entertains such actions when they arise under its own laws.

And since the Supreme Court has held in *McKnett* v. *St. Louis & San Francisco Railway Company*, 292 U. S. 230, that a state cannot discriminate against rights arising under federal law, the Court went on to hold that the Illinois statute could not deny an action because it arose under the Federal Employers' Liability Act.

(*Allendorf* v. *Elgin, Joliet & Eastern Railway Company*, Supreme Court of Illinois, March 22, 1956, Bristow, J., 8 Ill. 2d 164, 133 N.E. 2d 288.)

▪ But on the same day the Court rejected an argument in another case that the invalidity of the death-outside-of-state proviso rendered the entire section invalid, leaving only the statute as it existed prior to 1903, the date the proviso was inserted. The effect of this would have been to limit a wrongful-death recovery to $5,000.

The Court held that where certain portions of a statute are unconstitutional, other portions may yet be valid. It declared that what remained of the statute after the invalid proviso was stricken was complete in itself and capable of being executed wholly independently of that portion it had rejected.

(*Myers* v. *Krajefska*, Supreme Court of Illinois, March 22, 1956, Maxwell, J., 8 Ill. 2d 322.)

Civil Procedure . . . *federal jurisdiction*

▪ A federal district court has no jurisdiction to entertain a suit relating to the administration of estates in a state probate court, even where diversity of citizenship exists, the United States District Court for the District of Oregon has decided.

The estate in question was being administered in an Oregon probate court. The suit alleged that the executor had negligently managed the estate and had failed to pay the plaintiff her widow's allowance provided by Oregon law. Diversity of citizenship was alleged.

The Court ruled that it had no jurisdiction of the subject matter of the suit, and that it was immaterial whether diversity was present or whether the complaint stated a cause of action. The Court found that Oregon law provides a comprehensive system for the administration of estates in probate courts and that not even an Oregon state court of general jurisdiction had asserted a right to entertain a suit similar to the plaintiff's. Where federal courts have not been given jurisdiction by the Constitution or by law, the Court declared, they are in the same position as state courts and in diversity cases adopt the same remedy afforded by state courts.

The Court remarked that the Oregon system of estate administration gave the plaintiff ample remedy, and it concluded that the Tenth Amendment protects a state's exclusive jurisdiction over administration of estates.

(*McCan* v. *First National Bank of Portland*, United States District Court, District of Oregon, December 14, 1954, Fee, J., 139 F. Supp. 224.)

Constitutional Law . . . *how big the milk can?*

▪ A statute requiring evaporated skimmed milk to be sold in containers of not less than ten pounds net weight has been declared unconstitutional by the Court of Appeals of New York on the ground that it was unreasonable and arbitrary in relation to the problem with which it ostensibly dealt.

The statutory prohibition, of course, had the effect of preventing any sales of evaporated skimmed milk at the retail level for household use. The plaintiff manufacturer marketed its product, which was conceded to be wholesome and widely used, in 14½ ounce containers.

The Court agreed that a statute was entitled to a presumption of constitutionality, that protection of public health was within the ambit of police power and that questions

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

of the appropriateness of legislation were for the legislature.

It ruled, however, that due process demands that a law of this nature be reasonably related and applied to some actual and manifest evil. "The property of a citizen, including his right to sell non-deleterious substances, may not be taken from him without rhyme or reason", the Court remarked.

The Court noted that the apparent purpose of the legislation was to prevent customer confusion between evaporated skimmed milk and evaporated whole milk. This purpose could have been accomplished by a law as to distinctive marking, the Court concluded, and the container-size requirement was not a reasonable way of dealing with possible customer confusion.

Two judges dissented.

(*Defiance Milk Products Company* v. *Du Mond*, Court of Appeals of New York, February 16, 1956, Desmond, J., 309 N.Y. 537, 132 N.E. 2d 829.)

Contempt . . . . *congressional committee*

■ At a hearing conducted by a subcommittee of the House Committee on Un-American Activities in Chicago in 1954, John T. Watkins, a witness who was being asked whether he knew some thirty persons previously identified to the Committee as Communists, said:

> . . . I do not believe that any law in this country requires me to testify about persons who may in the past have been Communist Party members or otherwise engaged in Communist Party activities, but who to the best of my knowledge and belief have long since removed themselves from the Communist movement.

Now the full bench of the Court of Appeals for the District of Columbia Circuit has told the witness that 2 U.S.C.A. §192 is just such a law, and his conviction thereunder for refusing to answer the questions has been affirmed.

Previously a three-judge division of the Court had upheld Watkins' claim that the questions were not within the proper scope of the Committee's activities and that it had no authority to expose persons for the sake of exposure (42 A.B.A.J. 352; April, 1956). An *en banc* rehearing now has brought a different result. Judge Bastian, who dissented before, now writes the majority opinion, and Judges Edgerton and Bazelon, the former majority, maintain their position also, but as two dissenters against six other members of the Court.

The Court now rules that the joint resolution authorizing the inquiry was broad enough to permit the questions propounded to Watkins and that the questions were pertinent to a valid legislative purpose, which was discovery of the extent to which labor unions had been Communist-infiltrated. In this connection the Court quoted extensively from statements of the Committee's chairman regarding legislation which he contended its efforts had spawned.

Watkins specifically disclaimed protection under the Fifth Amendment and indeed had answered questions about his own Communist Party co-operation; he based his refusal to answer on the First Amendment. Answering this contention, the Court referred to its own decision in *Barsky* v. *U.S.*, 167 F. 2d 241, *cert. den.*, 334 U.S. 843, and declared that since Congress had power to inquire into Communism and into the extent and activities of the Communist Party, it also had authority to identify individuals who believe in Communism and belong to the Party.

Dealing with the contention that the Committee had actually asserted an unwarranted and independent power of exposure, the Court held that Congress has the power to expose if exposure is incidental to the exercise of a legislative function. "The fact that such an inquiry or investigation may reveal something or 'expose' something is incidental and without effect upon the validity of the inquiry," it remarked.

(*Watkins* v. *U.S.*, United States Court of Appeals, District of Columbia Circuit, April 23, 1956, on rehearing *en banc*, Bastian, J.)

■ Unlike Watkins, two witnesses who appeared before a subcommittee of the House Un-American Activities Committee in Seattle in 1954 refusd to answer questions because of the self-incrimination clause of the Fifth Amendment. The Court of Appeals for the Ninth Circuit has upheld the contentions of both and has reversed their convictions under 2 U.S.C.A. §192.

In one case the reluctant witness was indicted on ten counts for refusing to answer ten specified questions. He was convicted on five counts. The Court sheared off three more on the ground that the subcommittee had not denied his Fifth-Amendment claim and expressly directed him to answer. As to the remaining two counts, the Court ruled that the answers might have tended to incriminate him and that his privilege was well founded. These two questions dealt with the witness' employment record since 1935 and with the name of a "personal counseling" group with which the witness said he was presently identified.

The Court declared that the background and setting of the questions must be considered in weighing a claim to the Fifth-Amendment privilege. And it appeared from that setting that the witness had been identified as a "full time functionary" of the Communist Party. The Court noted, moreover, that one of the questions concerning the "personal counseling" group was whether there were in the group any persons who had been identified as Communists.

The Court asserted that this background made it clear that the witness was put on notice that he might be prosecuted under the Smith Act, as some others identified to the Committee as Communists had been. A part of the Government's case in a Smith-Act prosecution, the Court remarked, would be the witness' employment record since 1935, and the name of the "personal counseling" group, plus its Communist affiliation, would also be part of the case.

The Court concluded that answers to those questions "would have furnished a link in the chain of evidence needed in a prosecution" and that the witness was entitled to

claim the privilege of the Fifth Amendment.

(*Jackins* v. *U.S.*, United States Court of Appeals, Ninth Circuit, March 8, 1956, Pope, J., 231 F. 2d 405.)

■ In the other Ninth Circuit case, the witness was asked how soon after 1950 he moved from Bellingham to Seattle, Washington. The background of this question was that the subcommittee had heard the testimony of a self-confessed former Communist Party organizer that she knew a person by the same name as the witness as an active member of the Communist Party in Seattle during the period from 1949 to 1952.

The Court ruled that this witness had properly sought refuge in the Fifth Amendment, since a person in his position would have occasion to fear prosecution under the Smith Act and that an important part of the evidence against him would be identification of him as the same person named by the informer. Thus, whether he was in Seattle in 1950-1952 would be an important link in the evidence against him, the Court concluded.

(*Starkovich* v. *U.S.*, United States Court of Appeals, Ninth Circuit, March 8, 1956, Pope, J., 231 F. 2d 411.)

Contracts . . . *offer and acceptance*

■ A Louisiana Ford dealer, who was flushing out his 1954 models before the 1955's arrived, has found that his newspaper advertising went further than he expected.

The dealer advertised a "two-for-one" deal good for the last half of September, 1954. The ad in part read:

> BUY A NEW '54 FORD NOW
> TRADE EVEN FOR A '55 FORD
> Don't Wait—Buy a 1954 Ford now, when the 1955 models come out we'll trade even for your '54. You pay only sales tax and license fee. Your '55 Ford will be the same model, same body style, accessory group, etc. . . .

The plaintiff bought a 1954 car during the advertised period, trading his old car and paying the remainder in cash. Neither dealer nor buyer mentioned the special two-for-one deal. In December of 1954, when the new models arrived, the buyer went back to the dealer to get his 1955 car. The dealer said sorry. The buyer brought a suit for specific performance.

At the trial the dealer produced a purchase agreement signed by the plaintiff at the time of the transaction. This mentioned nothing of the special deal and specified in small print that it was the "entire agreement pertaining to this purchase". Penciled on the contract was "No '55 deal." The buyer testified that the fine print was not called to his attention and that the pencil notation was not on the written agreement either when he signed it or later when he went to get his new car.

The Court of Appeal for Louisiana, First Circuit, with one judge dissenting, affirmed the trial court's decree of specific performance. The Court turned down the dealer's argument that his advertisement was no more than an invitation to bargain, which the purchaser had failed to take up by omitting to mention the special deal in making his original purchase.

The Court held that the advertisement was a continuing offer to the public, or "what is denoted in the common law and our civil code as a unilateral contract, or obligation created by an offer accepted by an act: the offer or exchange of a promise for an act." The Court added that any obligation to mention the special deal at the time of the original purchase fell on the dealer.

The Court also rejected the dealer's argument that the buyer was bound by the written purchase contract. Noting that the small print had not been called to the buyer's attention, the Court quoted the Supreme Court of Ohio in *Meyer* v. *Packard Cleveland Motor Company*, 106 Ohio St. 328:

> There is entirely too much disregard of law and truth in the business, social and political world today. . . . It is time to hold men to their primary engagements to tell the truth and observe the law of common honesty and fair dealing.

(*Johnson* v. *Capital City Ford Company Inc.*, Court of Appeal of Louisiana, First Circuit, December 30, 1955, rehearing denied February 3, 1956, Tate, J., 85 So. 2d 75.)

Criminal Law . . . *perjury*

■ A federal district court judge has ordered the acquittal of a man charged with perjury before a congressional subcommittee, on the ground that the subcommittee was not performing a legislative function but was acting in the role of a "committing magistrate" when it examined him.

The defendant was Aldo L. Icardi, who has for several years been charged with guilt, or at least complicity, in the disappearance (or was it murder?) of an American OSS major at Villa Castelnuovo in Italy in 1944. Icardi has maintained his complete innocence for years, and it has been determined that if he were guilty there is no tribunal in which he might be tried. (See Fink and Schwarz, "International Extradition: The Holohan Murder Case", 39 A.B.A.J. 297; April, 1953.)

Nevertheless a special subcommittee of the House Armed Services Committee was appointed in the 83d Congress "to investigate the circumstances surrounding the disappearance and death" of Holohan. The subcommittee, after having taken some testimony, invited Icardi to appear before it in 1953. Upon doing so, he repeated his former statements of innocence.

The subcommittee issued a report amounting to an indictment of Icardi: he was referred to as "the accused", his version of Holohan's disappearance was termed "false" and the subcommittee said there was "probable cause" for charging him with murder and embezzlement, although he was not subject to prosecution under any existing civil law or the Uniform Code of Military Justice. On a charge that the answers he gave the subcommittee were false, Icardi was indicted and tried for perjury.

In directing a verdict of acquittal, the United States District Court for the District of Columbia declared

that only two subjects could be legitimately considered by the subcommittee since it was an arm of the legislative branch. These were: (1) whether existing law adequately covered the prosecution of crimes committed under the circumstance of the specific case, and (2) whether the Defense Department had functioned adequately in its investigation of Holohan's disappearance.

Continuing, the Court held that the subcommittee was not functioning within its proper legislative sphere when it questioned Icardi and issued the report accusing him of guilt. Therefore, the Court reasoned, the questions Icardi allegedly falsely answered were not asked by a "competent tribunal"—one of the requisites for a perjury conviction.

The Court ruled, moreover, that the answers did not relate to a "material matter"—the other requisite in perjury. In this connection, the Court said the test was whether the testimony was capable of influencing the tribunal on the issue before it, and it averred that "whether Icardi denied or confessed guilt could not have influenced the subcommittee's conclusion on subjects which might be legitimately under investigation", since it knew all of his probable testimony before calling him.

(*U.S.* v. *Icardi,* United States District Court, District of Columbia, April 19, 1956, Keech, J.)

Divorce . . . *unclean hands*

■ In New Jersey divorce is regarded as an equitable action and thus the chancery doctrine of unclean hands is applicable. The Superior Court of New Jersey, Chancery Division, has recently used the doctrine to deny a divorce.

The plaintiff had married the defendant in 1921 when he was already married. In his affidavit for a license to marry he stated that he had no former wife, living or dead. In 1932 he manufactured testimony to support an uncontested divorce from the first wife. In 1933 he went through another marriage ceremony with the defendant, but gave a false address in the application for a marriage license.

The Court declared the doctrine of unclean hands required the iniquitous conduct to be related to the particular matter as to which judicial relief is sought. The Court then found that the plaintiff's bad faith, trickery, deception and fraud were inextricably woven into the subject matter of the case.

"To allow plaintiff's application for divorce", the Court said, "would *ex necessitu* stamp with approval the prior fraudulent, deceptive and perjurious tactics by which he was able to acquire his status of an unmarried person to the end that he might marry the defendant . . . a marriage which is valid of record only because of his fraud." To grant a divorce would permit him to "complete his nefarious scheme", the Court concluded.

(*Pollino* v. *Pollino,* Superior Court of New Jersey, Chancery Division, February 24, 1956, Mariano, J., 121 A. 2d 62.)

Libel and Slander . . . *slander* per se

■ It is not slander *per se* to call someone a "Communist", the Court of Appeals of New York has decided.

The plaintiff was the chief engineer at a defense plant engaged in manufacturing tools and implements for the United States. The president of the company said to the plaintiff, "You are a Communist", within the hearing of several other employees. The plaintiff did not allege special damages in his complaint and thus the Court had to determine whether the words were actionable slander *per se.*

In holding that they were not, the Court emphasized that what may be actionable libel *per se* is not necessarily actionable *per se* when spoken. Thus, without an allegation of special damage, the complaint failed to state a cause of action.

But since the plaintiff's counsel asserted that his client had suffered special damages, the Court gave the plaintiff leave to file an amended complaint to include the allegation.

(*Gurtler* v. *Union Parts Manufacturing Company,* Court of Appeals of New York, March 15, 1956, *per curiam,* 1 N.Y. 2d 5, 132 N.E. 2d 889.)

Taxation . . . *business expenses*

■ Recently in *Mesi* v. *Commissioner,* 25 T.C. No. 64 (42 A.B.A.J. 274; March, 1956), the Tax Court ruled that it would frustrate the public policy of Illinois to permit a bookmaker operating in that state to deduct the amount he paid as wages in his business in arriving at his net business income for income tax purposes.

But in a similar case in which the Commissioner advanced the same theory, the Court of Appeals for the Seventh Circuit, with one judge dissenting, has held that IRC §23 (a) (1) (A) (1939 Code), authorizing ordinary and necessary expenses in carrying on a trade or business, including salaries and rent, is "clear and unambiguous". The Court asserted that the Internal Revenue Code is a taxing statute, the purpose of which is to raise revenue rather than to aid in the enforcement of a state's criminal laws.

The Commissioner had argued that rent and salaries were not deductible, but that all other expenses in the bookmaking operation were. But the Court would have none of this. Such a position, it said, would by judicial construction read "lawful" into the statute in addition to "ordinary and necessary" with reference to rent and salaries.

(*Commissioner* v. *Doyle,* United States Court of Appeals, Seventh Circuit, April 11, 1956, Schnackenberg, J.)

■ The Court of Appeals for the First Circuit has denied a Massachusetts dog-racing association an income tax deduction for the amount it spent to promote favorable votes in a referendum on the question of whether pari-mutuel betting should be permitted on licensed dog tracks.

The taxpayer claimed the expense as an ordinary and necessary expense in carrying on a trade or business, within IRC §23(a) (1) (A) (1939 Code). It contended that

the expense was "ordinary" under the circumstances, and that it was certainly "necessary" since without the expense there could have been no business.

But the Court rejected these arguments. It cited *McDonald* v. *Commissioner*, 323 U.S. 57, where the Supreme Court struck a distinction between ordinary and necessary expenses incurred by a judge in office and similar expenses in campaigning for re-election. "We can conceive of no public policy which, while denying to judicial officers the right to deduct expenses incurred in campaigning for an opportunity to do business for an additional term, would nevertheless permit a corporation engaged in dog racing to deduct expenses incurred in campaigning for an opportunity to engage in that business for an additional term", the Court remarked.

The Court also declared that the expenses were non-deductible because they were in the nature of lobbying cost.

(*Revere Racing Association, Inc.* v. *Scanlon*, United States Court of Appeals, First Circuit, May 9, 1956, Hartigan, J.)

What's Happened Since . . .

■ On April 23, 1956, the Supreme Court of the United States:

DISMISSED the appeal in *Flemming* v. *South Carolina Electric & Gas Company*, 224 F. 2d 752 (41 A.B.A.J. 1041; November, 1955), leaving in effect the decision of the Court of Appeals for the Fourth Circuit that the *School Segregration Cases*, 347 U.S. 497, are applicable to make racial segregation on intrastate public transportation repugnant to the Fourteenth Amendment, and that a Negro bus passenger who was forced by the driver to comply with a South Carolina segregation statute may maintain a Federal Civil Rights Act suit against the carrier in a federal district court notwithstanding the absence of diversity of citizenship, since the driver was acting for the carrier "under color of state law" within the meaning of §1343 (a) of the Federal Judicial Code (28 U.S.C.A.). The United States District Court for the Eastern District of South Carolina had held (128 F. Supp. 469, 41 A.B.A.J. 456, May, 1955) that application of the school decision to intrastate public transportation would be an "unwarranted enlargement of the doctrine" and "an unreasonable restriction on the police power of the state."

■ On April 30, 1956, the Supreme Court of the United States:

DENIED CERTIORARI in *U.S.* v. *Behrens*, 230 F. 2d 504 (42 A.B.A.J. 460; May, 1956), leaving in effect the decision of the Court of Appeals for the Second Circuit that, in practical effect, the cash surrender value of life insurance policies on the life of a taxpayer, against whom the Government had asserted an income tax lien during his lifetime, constituted a fund held for the insured, and the lien on the surrender value followed the fund into the proceeds of the policy and subjected the beneficiary to liability to the extent of the surrender value.

■ On May 7, 1956, the Supreme Court of the United States:

DENIED CERTIORARI in *National Lawyers Guild* v. *Brownell*, — F.2d — (41 A.B.A.J. 855; September 1955), leaving in effect the decision of the Court of Appeals for the District of Columbia Circuit that the National Lawyers Guild must exhaust administrative remedies with regard to its challenge of the Attorney General's authority to designate it as subversive, and that neither the Guild's due-process attack on the Attorney General's rules of procedure nor its contention that he had prejudged its case has sufficient merit to permit it to challenge the constitutionality of his basic authority without pursuing its administrative remedies. For previous action in the case, see 215 F. 2d 485 (40 A.B.A.J. 622; July, 1954) and 126 F. Supp. 730.

DENIED CERTIORARI in *Ettore* v. *Philco Television Broadcasting Corporation*, 229 F. 2d 481 (42 A.B.A.J. 274; March, 1956), leaving in effect the decision of the Court of Appeals for the Third Circuit that a professional boxer's advance sale of film rights to a prize fight staged in 1936 did not constitute a waiver of his right under New York, New Jersey, Pennsylvania and Delaware law to maintain an unfair competition suit against broadcasting companies that televised the fight films in 1949 on programs received in those four states. For the previous district court decision, see 126 F. Supp. 143 (41 A.B.A.J. 556; June, 1955).

REVERSED (6-to-3, with majority opinion by MR. JUSTICE BLACK) *NLRB* v. *Truitt Manufacturing Company*, 224 F. 2d 869 (41 A.B.A.J. 957; October, 1955), and held that under the circumstances of the case the employer was guilty of not bargaining in good faith, as required by the National Labor Relations Act, when it refused to permit the union access to its books to substantiate its claim, raised during wage-increase negotiations, that it could not afford to pay the increase requested by the union. The NLRB had supported the union's position, but the Court of Appeals for the Fourth Circuit denied enforcement of the Board's order on the ground that good-faith bargaining does not require employers to disclose matters which lie in the province of management, such as financial condition, manufacturing costs and dividends.

■ On February 16, 1956, the Court of Appeals of New York (309 N.Y. 1005, 133 N.E. 2d 456,) affirmed *Dajkovich* v. *Waldorf Astoria Hotel Corporation*, 137 N.Y.S. 2d 764 (41 A.B.A.J. 458; May, 1955), leaving in effect the decision of the Supreme Court, Appellate Division, First Department, that a hotel was not entitled to the protection of the statutory limit of liability of $100 per piece of luggage checked where the hotel sold the luggage as unclaimed without complying with the state law provisions relating to the sale of unclaimed baggage.

Department of Legislation

Charles B. Nutting, Editor-in-Charge

The Honorable Mr. Justice J. V. Barry is a Judge of the Supreme Court of the State of Victoria, Australia, and is also Chairman of the Department of Criminology of the University of Melbourne. During 1955 he visited the U.S.A. under a grant from the Carnegie Corporation of New York for the purpose of investigating developments in criminology.

Statutory Interpretation in Australia

by John Vincent Barry

I.

■ From the year 1788 onwards, British settlements were founded in different parts of the Australian continent. In the course of time, these settlements developed into six colonies, each with its own legislature, executive and judiciary. At the turn of the century, the people of the colonies agreed "to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom", and by an Act of the Parliament of Great Britain, the Commonwealth of Australia Constitution Act (63 & 64 Victoria C. 12), the Commonwealth was established, and it was provided that the Constitution of the Commonwealth, set out in Section 9 of the Act, should take effect on and after the day to be appointed. The day so appointed was January 1, 1901.

The colonies mentioned in the act were five, and the people of the sixth, Western Australia, voted to join on July 31, 1900. Under the Act, the colonies were known as states, and hence when the Constitution took effect the Commonwealth of Australia consisted of the present six states, New South Wales, Victoria, South Australia, Queensland, Tasmania and Western Australia.

Broadly, the scheme of the Constitution was to set up a legislature, an executive and a judiciary. Powers to make laws on specified subjects are committed to the Commonwealth, and where there is an inconsistency between a law validly made under one or more of these powers, and a state law, the Commonwealth law prevails. The states retain the power to make the laws on all subjects not committed to the Commonwealth.

The Constitution was framed at a series of conventions, and the Constitution of the U.S.A. exercised great influence upon the distinguished lawyers who took part in them. The resemblances are marked, but the differences are significant and important. "The framers of our own Federal Commonwealth Constitution (who were for the most part lawyers) found the American instrument of government an incomparable model", observed Sir Owen Dixon, the present Chief Justice of the High Court of Australia. "They could not escape from its fascination. Its contemplation damped the smouldering fires of their originality. But although they copied it in many respects with great fidelity, in one respect the Constitution of our Commonwealth was bound to depart altogether from its prototype.

> It is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's Dominions. In the interpretation of our Constitution this distinction has many important consequences. We treat our organs of government simply as institutions established by law, and we interpret their powers simply as authorities belonging to them by law. American doctrine treats them as agents for the people who are the source of power and their powers as authorities committed to them by a principal. From this arises the theory that powers may not be delegated; that the agent selected by the principal to exercise a function of government may not transfer any part of his authority to some other person or body, a theory which finds no place in our system. [(1935) 51 Law Quarterly Review at page 597].

Although the framers of the Australian Constitution were fascinated by the elegancies of the American model, they were also the creatures of their time, lulled into the belief that respect for fundamental individual liberties was so firmly established that they were secure from assault. Actually, by convention, by the taught tradition which molds judicial activity, by legal doctrines and by force of public opinion, civil liberties have been preserved in Australia in great vitality and vigor, but there is nothing in the Australian Constitution resembling the Bill of Rights and the Fourteenth Amendment, except that Section 116 prohibits the Commonwealth from establishing a religion or abridging religious freedom.

In Australia the techniques of legal interpretation are required in respect of a variety of forms of legislative expression. They are the Constitution of the Commonwealth of Australia, and statutes enacted by the Parliament of the Commonwealth; statutes enacted by the Parliaments of the states; and subordinate legislation, ranging from regulations made under powers delegated by a Parliament to by-laws made by various instrumentalities.

The Australian legal practitioner who seeks information and instruction upon the principles upon which these techniques rest, or desires illustrations of their application, is confronted with an enormous miscellany of reported cases. From the point of view of precedent, the decisions which are technically binding on a judge of the Supreme Court of an Australian State are

those of the Privy Council, the High Court of Australia, and the Full Court of the Supreme Court of that state. He is not bound by the decision of a single judge of his own court, but will follow it unless it is clearly wrong or inadequate. Decisions of the House of Lords are regarded as coercive, whilst those of the English Court of Appeal are of high persuasive authority and a single Supreme Court judge, sitting alone, would rarely refuse to follow them, for the desirability of having the case law as uniform as practicable throughout the British Commonwealth of Nations is fully recognized. Decisions of the supreme courts of other states, and of the superior courts of other members of the British Commonwealth may be cited as persuasive authorities. Where the problem has a counterpart in U.S.A., decisions of the federal and state courts may also be used persuasively.

II.

Practically speaking, most questions of constitutional interpretation are reserved to the highest federal court, the High Court of Australia, but occasionally the Privy Council may deal with them. As the Constitution is written, the doctrine of judicial review of federal legislation to ascertain if it is within power applies, and the High Court, subject to limited appeal to the Privy Council, is the body entrusted with this function.

"The questions whether an Act of the Federal Parliament is valid, and if so, whether it involves any and what legal consequences can be determined only by an exercise of judicial power either by this Court, by some other Federal Court which the Federal Parliament has created, or by some other Court which it has invested with Federal jurisdiction" (*Australian &c. Board v. Tonking*, [1942] 66 C.L.R. 77 at page 104).

In the performance of this task, it was inevitable that American decisions should have great weight, and Chief Justice Marshall's opinions in *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), and, *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), and on principles of federal supremacy have been constantly invoked. The present Chief Justice of the High Court of Australia, Sir Owen Dixon, discussed these matters in his address, "Marshall and the Australian Constitution", at the recent conference at Harvard Law School on Marshall's bicentennial. See 29 AUSTRALIAN LAW JO. 420 (1955).

The interpretative function of the Court was described by Mr. Justice Fullagar in the *Australian Communist Party* v. *the Commonwealth*, [1951] 83 Commonwealth Law Reports 1, at page 262, a case in which the Court (Sir John Latham, the then Chief Justice, dissenting) declared Commonwealth legislation directed to the outlawry of the Communist Party to be unconstitutional.

> Nothing depends on the justice or injustice of the law in question, [he observed]. If the language of the Act of Parliament is clear, its merits or demerits are alike beside the point. It is the law, and that is all. Such a law as the Communist Party Dissolution Act could clearly be passed by the Parliament of the United Kingdom or by any of the Australian States. It is only because the legislative power of the Commonwealth Parliament is limited by an instrument emanating from a superior power that it arises in the case of the Commonwealth Parliament. If the great case of *Marbury* v. *Madison* (1803 1 Cr. 137) had pronounced a different view, it might perhaps not arise even in the case of the Commonwealth; and there are those even today, who disapprove of the doctrine of *Marbury* v. *Madison*, and who do not see why the courts, rather than the legislature itself, should have the function of finally deciding whether an Act of a legislature in a federal system is or is not within power. But in our system the principle of *Marbury* v. *Madison* is accepted as axiomatic, modified in varying degree in varying cases (but never excluded) by the respect which the judicial organ must accord to opinions of the legislative and executive organs.

That the Court is concerned only with the legality and not with the desirability or utility of the legislation is constantly insisted upon. In the *Uniform Taxation Case*, [1942] 65 C.L.R. 373, Latham, C.J., observed, "the controversy before the Court is a legal controversy, not a political controversy. It is not for this or any court to prescribe policy or to seek to give effect to any views or opinions upon policy. We have nothing to do with the wisdom or expediency of legislation. Such questions are for Parliament and the people."

Although the Constitution, being a statute, is to be interpreted on the same principles as an ordinary statute, its character necessarily involves that it is broad and general in its terms, intended to apply to varying conditions as they arise. This necessarily affects its interpretation, and the Court leans to the broader as opposed to the narrower interpretation. *Jumbunna Coal Mine Co.* v. *Victorian Coal Turner's Association*, [1908] 6 C.L.R. 309 at pages 367-8; *A.G. (N.S.W.)* v. *Brewery Employees' Union*, [1908] 6 C.L.R. at 611-12; *Bank of N.S.W.* v. *The Commonwealth*, [1948] 76 C.L.R. at 332.

Since the adoption by the Commonwealth Parliament of the Statute of Westminster of 1931, an enactment of the Commonwealth Parliament cannot be challenged on the ground of its extra-territorial operation. However, a state legislature may validly enact only laws which operate within the confines of the State, or have a sufficient connection with the territorial area of the state, but laws broadly expressed will be read down to bring them within power unless that reading plainly is not open.

Citation of convention or parliamentary debates to elucidate the meaning of the Constitution or acts of Parliament is not permitted, and the Court usually restricts itself within the limits of the doctrine of judicial notice, and accordingly depends on matters of general public knowledge. (*Stenhouse* v. *Coleman*, [1944] 69 C.L.R. at page 469). The principle was stated by Latham, C.J., thus,

> The words of a statute, when applied to the state of facts with which the statute deals, speak for themselves. They express the intention of Parliament. A statute may be based upon

the report of a committee or of many committees, or upon cabinet memoranda, or upon a resolution of a political party or of a public meeting, or upon an article in a newspaper. The intention of Parliament as expressed in the statute cannot be modified or controlled in a court by reference to any such material. If a statute refers to such material the case is different. . . . Reports of speeches in Parliament are also irrelevant and inadmissible. . . . Neither the validity nor the interpretation of a statute passed by Parliament can be allowed to depend upon what members, whether ministers or not, chose to say in Parliamentary debate. [*South Australia* v. *the Commonwealth*, 65 C.L.R., at page 409. In a few cases, evidence by affidavit on strictly limited matters has been admitted. (*Jenkins* v. *Commonwealth* (1947) 74 C.L.R. 400; *Sloan* v. *Pollard* (1947) 75 C.L.R. 445; *The Banking Case* (1948), 76 C.L.R. 1), but this can usually be accounted for by the nature of the proceedings, *e.g.*, a motion for an interlocutory injunction or the like. (See the article *Evidence in Constitutional Cases*, (1949) 23 Aust. Law Jo. 237 (1949).]

A preamble of an Act may be looked at, but it will not be treated as conclusive. "A Parliament of limited powers cannot arrogate powers to itself by attaching a label to a statute". (*South Australia* v. *The Commonwealth*, [1942] 65 C.L.R. 373 at page 432). Statutory recitals do not control the court. It is said to be "contrary to principle to allow even *prima facie* probative force to recitals of facts upon which the power to make the law in question depends". *Australian Communist Party* v. *The Commonwealth* [1951] 83 C.L.R. at page 264.

The principles for the interpretation of statutes, and the rules to give effect to those principles, are the same in Australia as they are in England, and they are applied to the Constitution as a statute as well as to all other legislative enactments. Basically, the approach is the "Golden Rule" described by Lord Wensleydale in *Grey* v. *Pearson*, [1857] 6 H.L.C. 61, at page 106; 10 E.R. 1216, at page 1234, in the passage,

> I have been long and deeply impressed with the wisdom of the rule, now I believe, universally adopted in the Courts of Law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further.

But *Heydon's Case*, [1584] 3 Co. Rep. 7a, at par. 7b.; 76 E.R. 637 at page 638, is available to judges who wish to interpret legislation by regarding the true reason of the remedy which the legislature has provided for a previously existing mischief. Moreover, it has been said by the highest authority that "where in a statute words are used capable of more than one construction the results which would follow the adoption of any particular construction are not without materiality in determining what construction ought to prevail" (per Lord Parker, *Brunton* v. *The Commissioner of Stamp Duties*, [1913] A.C. 747 at page 759). Gaps in a legislative pronouncement, however, cannot be supplied by judicial intervention. The suggestion of Lord Justice Denning in *Magor and St. Mellons R.D.C.* v. *Newport Corporation*, [1950] 2 All. E. R. 1226 at 1236, that "We sit here to find out the intention of Parliament and of Ministers and carry it out and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis", received short shrift from the House of Lords, and would fare no better with the High Court of Australia. When Lord Justice Denning's proposition came before the House of Lords, [1951] 2 All. E. R. 839 at page 841, Lord Simonds characterized it as, "A naked usurpation of the legislative function under the thin disguise of interpretation . . . . If a gap is disclosed, the remedy lies in an amending Act". As an exercise in interpretation, one may wonder, incidentally, if something which is thinly disguised can be properly described as naked.

III.

The discharge by the judges of the High Court of their function as interpreters of the Constitution presents a fascinating field of study, but the limits of this article permit brief reference to three only of the many constitutional provisions which have called for its exercise.

Section 92 of the Constitution was the work of laymen. Its presently operative part reads, "On the imposition of uniform duties of customs, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free". It will be noted that the section does not say from what restrictions trade commerce and intercourse are to be "absolutely free". This and the circumstance that, in Lord Porter's words, "The problem to be solved will often be not so much legal as political, social or economic, yet it must be solved by a court of law," *The Banking Case*, [1949] 79 C.L.R at page 639, have produced a persistent conflict of judicial opinion, and the section has resulted in more litigation than any other provision in the Constitution. *Nicholas, The Australian Constitution*, (2d ed., 1952) page 250. Under a recent decision of the Privy Council, what had been for many years the minority view of the proper interpretation of the section in its application to inter-state transport has now become the authoritative opinion. (*Hughes & Vale* v. *N.S.W.*, [1954] 28 *Aust. Law Jo.* 385; (1955) A.C. 241).

During the two World Wars the Commonwealth's control over the economic and social life of Australia was greatly increased, and the constitutional basis for its activities was found, largely, in the power to make laws for "the naval and military defense of the Commonwealth and of the several States". (*Constitution*, Sec. 51 (VI)). But the subject matters in respect of which this power may be exercised lessen when war ends; as the period of active fighting recedes, the ambit of the power contracts, but the contracting

process is gradual, permitting the orderly winding up of the state of affairs produced by the emergency. A war of any magnitude, as Sir Owen Dixon has observed (*Australian Communist Party* v. *Commonwealth*, [1951] 83 C.L.R.1, at page 202) involves the government in necessities of organization and control on a scale formerly unknown, and these necessities "make it imperative that the defense power should provide a source whence the government may draw authority over an immense field and a most ample discretion. But they are necessities that cannot exist in the same form in a period of ostensible peace. . . . The federal nature of the Constitution is not lost during a perilous war. If it is obscured, the federal foundation of government must come into full view when the war ends and is wound up."

The judicial approach to the interpretation of war time legislation and executive regulations was determined by these considerations, applied in the light of the judges' assessment of the situation at the time when it was necessary for the interpretative function to be exercised. But the defense power and the other powers enumerated in Section 51 are there specifically stated to be "subject to this Constitution", and a regulation purporting to be made under the defense power to suppress the religious sect known as Jehovah's Witnesses was held to be ineffective by reason of its conflict with Section 116, forbidding the Commonwealth to "make any laws . . . prohibiting the free exercise of religion". *Adelaide Company of Jehovah's Witnesses Inc.* v. *Commonwealth*, [1943] 67 C.L.R. 116.

The Commonwealth Parliament's power to deal with industrial matters is very limited; it may make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state". The exercise of the interpretative function in this field has been frequent. The framers of the constitutional formula did not envisage the vast economic changes that have occurred since 1900, and constant endeavors have been made to escape from its limitations, but they have not been conspicuously successful. Parliament may not legislate directly upon industrial conditions, but these may be affected over a wide area of industry by a Court it has created, the Court of Conciliation and Arbitration, by awards relating to the basic wage and standard hours of work, for example, made in litigious proceedings between unions and employers. It has been held by the High Court that an award may bind a state insofar as it is carrying on commercial or industrial undertakings. *Engineers Case*, [1920] 28 C.L.R. 129.

The autonomy of the states was considerably curtailed by an interpretation by the High Court of the Constitution and federal legislation which has had the effect of prohibiting the states from imposing income tax, and has enabled the Commonwealth to determine, as to three fifths of the amount, what state revenues shall be. (*South Australia* v. *The Commonwealth*, [1942] 65 C.L.R. 373). Indeed, there is a growing opinion that only the husk of federation is left, and that the present outmoded machinery should be drastically altered to enable a solution of the problems of the times to be sought by less legalistic and devious means. How this could be achieved is far from clear, though; outright amendment of the Constitution can be made only by a process which requires approval by a referendum which is effective only if carried by a majority of the electors voting in the Commonwealth and a majority of the electors in four of the six States, (*Constitution*, Section 128), and this has operated as a substantial barrier against change.

IV.

The differences of approach, arising from dissimilar functions, between the legislature which enacts measures conceived by the executive and the judiciary which interprets them has led to provisions designed to circumscribe or by-pass the courts as the organ entrusted with the task of interpretation. In South Australia, for example, it is provided by the Local Government Act 1934-1952, Sections 674-676, that after a local government body has passed a by-law, the Crown Solicitor (a lawyer employed as a civil servant by the government) is required to give his opinion upon it and if he certifies that it is not contrary to or inconsistent with the statute or the general law, and is within the competence of the local government body, and the by-law is not disallowed by Parliament, it cannot be held invalid for want of competency or inconsistency. Thus a traditionally judicial function is by statute committed to a civil servant who is part of the executive machinery. The validity of this provision has not yet come before the courts for decision. In that State, also, the Acts Interpretation Act 1915-1949, Section 22, provides that "every Act and every provision or enactment thereof, shall be *deemed remedial*, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to their true intent, meaning and spirit". It may require considerable change of judicial outlook to regard a harsh penal Act or a revenue statute as "remedial"! This smacks of the Humpty Dumpty approach to semantics. " 'When I use a word'—Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less' ". Perhaps some light is thrown on the reason for such an enactment by Humpty Dumpty's next observation, " 'The question is . . . which is to be master—that's all,' " for these provisions all stem from an endeavor to prevent the courts from invalidating legislative measures, whether of parliamentary or subordinate origin, and they are often indications of the struggle by the bureaucracy to by-pass the judicial organ.

The doctrine of "severability" has found legislative expression both in Commonwealth and state legislation. For example, Section 15A of the Commonwealth Acts Interpretation Act 1901-1950 provides, "Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power". There are similar but more elaborate provisions concerning the construction of rules, regulations, by-laws, resolutions of the Parliament and regulations under statutes. Such provisions are rules of construction and reverse the presumption that Parliament intends the whole of its enactment to stand or none at all. They will be applied unless it can be seen that the intention of Parliament was that the provisions of the enactment were interdependent and were intended to stand or fall together, (*A.N.A.* v. *Commonwealth,* [1945] 71 C.L.R. at page 65 and at page 92.)

Governmental purposes are sought to be achieved in Australia, as elsewhere, by an ever-increasing flood of statutory rules, regulations and by-laws. These emanate from the executive, from ministers (who are the parliamentary representatives who head government departments), from government boards, statutory agencies and corporations, and from local government bodies. They can be made only under an express authority from Parliament, but there is a regrettable tendency for acts of Parliament to confer on these bodies power in "blanket" terms. Broadly, the principles for the interpretation of this subordinate legislation are the same as are employed in statutes, although the judicial disposition is to treat them with less deference than statutes, which are direct expressions of the legislative will. If, on a proper construction of the authorizing Act, the power to make the regulation or statutory rule or the like is found, and the formalities prescribed for its making have been observed, and its meaning is ascertainable by the customary processes, and no other fatal defect appears, it will be held valid, although it may happen that the judicial interpretation of its meaning may not coincide with the intention of the bureaucratic agency that fathered it.

The judicial inclination is, wherever possible, to read penal legislation in the light of "the much more reasonable doctrine that when a statute introduced into our code a new offense it should be understood *prima facie* to take its place in a coherent general system and to be governed by the established principles of criminal liability", (*Thomas* v. *The King,* [1937] 59 C.L.R. 279; *Rex* v. *Broughton,* [1953] Victorian Law Reports 572), so that *mens rea* is still the broad test to determine if conduct is criminal. In these cases a statutory provision relating to bigamy was interpreted so that an honest belief on reasonable grounds in a set of facts which, if true, would exculpate from liability, furnished a defense. This approach was adopted in disregard of the decision of the English Court of Criminal Appeal in *Rex* v. *Wheat & Stocks,* [1921] 2 K.B. 119. (See Jerome Hall, *General Principles of the Criminal Law,* page 369.) But there is a strong tendency for the courts to treat honest and reasonable mistake as excluded as a defense in the case of summary offenses created by statutes or subordinate legislation, particularly where the legislation is concerned with social and industrial regulation. (*Proudman* v. *Dayman,* [1941] 67 C.L.R. at page 540; *Dowling* v. *Bowie,* [1952] 86 C.L.R. 136; *Bergin* v. *Stack,* [1953-4] 88 C.L.R. 248 at pages 260-1).

V.

It may be asked, how successful in Australia is judicial interpretation as a device contributing to social equilibrium? Granting the validity of a great deal of the criticism that is made of it, and despite the frustrations it imposes from time to time on schemes for social amelioration, a substantial argument can be made that it is one of the factors which, under existing conditions, preserves stability. Its methods are sufficiently revealed and known to make prediction possible, which cannot always be said of administrative agencies.

Consciously, judges usually remember, in Bacon's phrase, that their office is *jus dicere* and not *jus dare.* But a man's opinion is the product of all the conditioning factors which have operated upon him up to the point of its formation and pronouncement; as Mr. Justice Holmes pointed out, in *The Path of the Law,* "Most of the things we do, we do for no better reason than our fathers have done them or that our neighbors do them, and the same is true of a larger part than we suspect of what we think".

Despite the attempts that have been made to by-pass the courts, responsible opinion agrees with the late Professor Harold J. Laski that "the historic principle of the rule of law cannot be better protected than by making the ordinary judges the men who decide the legality of administrative action". (*Report of Committee on Ministers' Powers,* 1932, Cmd 4060, at page 135). But there is a strong feeling that there is room for improvement in the methods the judges employ. (*Cf.* Sir Herbert Mayo, *The Interpretation of Statutes* (1955) 29 Aust. Law Jo. 204). Sir Frederick Pollock, hardly a radical in outlook, wrote, "There is a whole science of interpretation better known to judges and parliamentary draftsmen than to most members of the legislature itself. Some of its rules cannot well be accounted for except on the theory that Parliament generally changes the law for the worse, and that the business of judges is to keep the mischief of its interference within the narrowest possible limits". (Essays in Jurisprudence and Ethics, page 85).

The framers and enactors of legislation are the producers, and the judges, to some extent at least, the representatives of the consumers. As the Chinese say, they may sleep in the same bed, but their dreams are different. When the measure leaves the draftsman, however perfect loving care may have made it, it is still untried. When it comes to the judge, it is because someone has alleged that its perfection is illusory, and that, unjustly or in disregard of accepted notions, it has invalidly sought to interfere with established rights of property or permissible individual liberties, or has sought to impose impossible social obligations. The draftsman has dealt with the abstract, however imaginatively envisaged in its concrete application; the judge is concerned with the human situation to which the abstractly conceived formula is sought to be applied. Perhaps the creditable thing is not that they occasionally part company, but that they are so frequently in unison.

Conservatively exercised, the interpretative function may delay social change, but it does not defeat it. Enactments startling to one generation of judges lack novelty to their successors. In Australia, as in U.S.A., the existence of a written constitutional instrument has resulted in the judges of the Federal Court exercising functions strange to English and Continental lawyers. The constant assertions by those judges that they arrive at their opinions unaffected by political considerations of a controversial kind may be accepted, but history shows that in that field of intellectual activity, true doctrine is not absolute, but is often the opinion of the fortuitous majority.

Significant though they may be in the life of the nation, major constitutional decisions belong to the stratosphere of judicial interpretation, and the ordinary citizen is more immediately affected by the way in which the written laws are interpreted and applied by the courts in the day-to-day discharge of the business that comes before them. Generally speaking, harsh interpretations there are rare, and capricious ones rarer still. And when they do occur, perhaps it is not too much to say that such aberrations belong to the pathology rather than the physiology of the judicial process.

Opinion of the Professional Ethics Committee

OPINION 290

(Adopted January 26, 1956)

Advertising—Acquiescence by law firm in inclusion by municipality of their firm name in bond circular as approving the legality of the bonds.

CANON 27

OPINIONS 76, 100, 285

■ The Opinion was stated on behalf of the Committee.

We have been asked by a local bar association to reconsider our Opinion 285 and to pass on the ethical propriety of a local firm *(A, B and C)* permitting a municipality or a bond house selling its obligations to publish an advertisement offering its bonds as follows: "These bonds are offered when, as and if issued and received by us and subject to approval of legality by Messrs. *A, B and C.*"

We adhere to Opinion 285.

The value of municipal bonds is peculiarly dependent on the assurance of compliance with all the required legal formalities and it is hence most important for purchasers of them to be confident that the legal steps in their issuance have been in charge of competent lawyers. For the municipality to give such assurance is primarily in its interest and in that of the purchasers. Although some advantage to the law firm may result, this is incidental.

The case in our opinion comes within our statement in Opinion 285:

> The Canon does not require a lawyer to condemn or prevent every allusion to him by satisfied clients where the purpose of the statement is not to advertise the lawyer but is obviously and primarily in the interest of the party making it, or of those to whom it is directed, even though some incidental advantage to the lawyer may possibly result. For example, this Committee held in Opinion 100, that it was not improper for a bondholders' protective committee to specify the name of its counsel in its published notice directed to bondholders, where such information was inserted not with the object of advertising such counsel, but with the bona fide purpose of giving to the depositing bondholders the names of the counsel who would represent them. This, like the personality of the members of the committee, was a fact which it was evidently important that they should know in making up their minds whether or not to deposit their bonds. Laws regulating the issue of corporate securities normally require the submission of an opinion of counsel who pass on their legality, and permit reference to such counsel by name in prospectuses.

It is analogous to the situation presented in Opinion 100 and not to that in Opinion 76, where a lawyer was asked by an accident insurance agent to write a letter stating that he had settled a recent suit for his company by paying the claimant $5,000, which letter the agent proposed to use in selling policies to future prospects. The Committee condemned the proposed use of the lawyer's name in this case because for the promotion and advertisement of the client's business. It was not to satisfy people who had a right to know that the legalities of a given transaction had been adequately attended to.

The question is always, as we said in Opinion 285, whether under the circumstances the furtherance of the professional employment of the lawyer is the primary purpose of the advertisement, or is merely a necessary incident of a proper and legitimate objective of the client which does not have the effect of unduly advertising him.

BAR ACTIVITIES

Paul B. DeWitt • Editor-in-Charge

J. Lance
LAZONBY

■ The 50th Annual Meeting of the lawyers of Florida has elected J. Lance Lazonby to the presidency of The Florida Bar. Mr. Lazonby succeeded President Donald K. Carroll, who, in relinquishing the burdens of office, wished the new President "the finest thing any President of The Florida Bar could have—the same wonderful cooperation that I have received throughout the year from the members of The Florida Bar everywhere".

The meeting, held at Hollywood Beach, Florida, early in May, heard Senator Henry M. Jackson, of Washington, speak on "The Peaceful Atom and Its Meaning to Florida". Howard Pyle, Deputy Assistant to the President of the United States, spoke on "The Responsibility of the Lawyer in Our Time". At the Annual Banquet, Justice W. St. John Garwood, of the Supreme Court of Texas, spoke on "Erratio Judicis".

The lawyers who were at the meeting attended a number of Institutes. The Institute on Labor Relations heard Justice Stephen C. O'Connell of the Florida Supreme Court deliver "A Jurist's View of Labor Controversies". The General Counsel of the National Labor Relations Board—Theophil C. Kammholz—spoke on the procedure of the NLRB, and Lucille Snowden Mitchell, of Miami, discussed "Pre-Emption of Labor Controversies by the Federal Government". An Institute on "Probate and Guardianship Problems" was held, as well as Institutes on Taxation and Trials.

Cloyd
LAPORTE

■ Cloyd Laporte of New York City was elected President of the New York State Bar Association at the 79th Annual Meeting of the organization this year. Mr. Laporte succeeds Judge Edmund H. Lewis, who is retired Chief Judge of the New York State Court of Appeals.

The 79th Meeting, held at the House of The Association of the Bar of the City of New York, was welcomed by Mayor Robert F. Wagner, and heard an address by Herbert Brownell, Jr., the Attorney General of the United States. Members also saw a play, entitled *The Maze*, which dramatized the fragmentation of the court system of the State of New York.

Membership Chairman S. Hazard Gillespie reported that "We are now by far the largest voluntary State Bar Association in the country." More than 1,000 new members during the past year pushed the total membership to over 9,200.

The Association's Fifth Annual Gold Medal Award of Merit was presented to Harrison Tweed for his outstanding contributions to the legal profession. Mr. Tweed is currently chairman of The Temporary Commission on the Courts, a body set up by the legislature to study the court system and recommend reforms.

Some 1000 persons attended the Association's annual dinner at the Waldorf-Astoria Hotel and heard addresses by E. Smythe Gambrell, President of the American Bar Association; Judge John Van Voorhis of the New York Court of Appeals, and Mr. Tweed.

A successful innovation of this year's annual meeting was the Trial Lawyers Section. Some 700 persons attended a Trial Practice Forum sponsored by the Section.

Among Cloyd Laporte's first duties as new President of the New York State Bar Association was to announce the publication of suggested "Standards for Title Examination". The standards, approved and adopted by the Executive Committee of the Association, were drawn up by the Committee on Real Property Law, of which Carl D. Schlitt of Brooklyn is chairman. Copies already have been distributed to members of the Association.

■ The District of Columbia Bar Association is moving forward on two public-service fronts.

First of all, the Association has just set up Lawyer Referral Service. W. Cameron Burton, Godfrey L. Munter, George J. Goldsborough, Jr., and Howard C. Westwood worked out the details within lines laid down by the full Association. Applications for registration on the panel of the Service have gone out to members of the District Bar.

And a Lawyer Placement Service has been established by members of the Junior Bar Section of the Association. The Placement Service sends applications to law firms, lawyers, and government departments and agencies that are seeking part- or full-time legal assistance. The service is available only to members of the Association.

■ Two men of law—a judge and a professor—have recently been honored for their services to the profession.

The Bar Association of the Dis-

trict of Columbia conferred a Certificate of Distinction and Merit upon Nathan Cayton, Chief Judge of the Municipal Court of Appeals of the District. "At his appointment, the youngest lawyer to be so honored by a President of the United States," said the citation, "for twenty-nine years as a judge of the courts of the District of Columbia, he has demonstrated those qualities characteristic of the highest ideals and principles of American justice."

And at the Southwestern Legal Center in Texas, some 300 legal books and a plaque were added to the Faculty library in honor of the late Robert B. Holland. Dean Robert G. Storey said he hoped the collection would continue to grow as a tribute to Mr. Holland, who was the first instructor appointed to the law faculty and an untiring benefactor of the Legal Center.

■ Justice Glenn Terrell of the Supreme Court of Florida once stated that the Canons of Professional Ethics "should be read by every lawyer as often as his preacher reads the Bible". The Florida Bar, acting in the spirit of Justice Terrell's pronouncement, has recently published and distributed to its members an attractive, 40-page booklet entitled "Your Privileges and Responsibilities as a Lawyer in Florida". It contains the Canons of Professional and Judicial Ethics; the Oath of Admission; Summaries of Opinions of The Florida Bar's Committee on Professional Ethics; Rules Governing the Conduct of Attorneys in Florida, and citations of Florida Supreme Court decisions on the privileges and responsibilities of lawyers. The booklet also sets forth quotations on the "Nature of the Legal Profession" from Roscoe Pound, Henry Stimson, Alexander H. Stephens, Charles Evans Hughes, John H. Wigmore, Henry S. Drinker and Justice Terrell.

■ Out of Ohio comes the story of a four-man law firm that put a bridle on runaway inflation. It began as the old story of rising office costs and static income. Clients protested the size of the fees and some refused to pay. One old client, after getting his billing for "Services Rendered—$350. Please remit", said he thought the firm wanted to keep his business, not to kick it out the door. The partners, in a lawyer-like way, began to analyze their list of clients, their fees, and their billings to see what was wrong.

They decided that their method of billing was wrong. The traditional calendar book, the firm decided, did not accurately and fully mirror the amount of work put in on cases. The lawyers evolved a system of separate records for every matter, with the lawyer handling the matter entering work done, time spent and action taken. Every phone call, every brief visit by a client, every moment spent was logged in. "These records", says the Ohio State Bar Association report, "have made it possible for these lawyers to charge and get higher fees than the average because they now have the detailed information to support and justify their fee charges to their clients."

"It has worked for them," says the report, "and it will work for you, whether you run a one-man show or twenty."

■ "At long last—a home!" That phrase is at once a battle-cry and a sigh of relief for the Queens County, New York, Bar Association. It's a sigh of relief because ever since 1876, when the Association was founded, it has been living, like a young married couple, in a succession of rented rooms. Now, with the family grown to 1,800, it has decided to build a home of its own—a home with 15,000 square feet of space that will include an auditorium, consultation and committee rooms, a library, a board room, legal aid conference rooms and a rumpus room. Like any family planning to build, however, there are money problems, and "At long last—a home!" is a battle-cry for fund-raising. Some $350,000 are needed, and, at a recent family gathering, the Association launched its campaign. Samuel S. Tripp will be the chairman of the General Building Committee and George J. Balbach will head up the Finance Committee. The Committee on Furnishings, Decorations and Memorials will be chaired by Charles Margett. It won't be long until they start packing the dishes.

■ About ten years ago, lawyers and judges in Williamson County, Illinois, faced a new problem—crowded dockets and delays. Today, the Bar and Bench can say the problem has been brought under control by a unique system of co-operation. They call it "The Williamson County Experiment", and Gordon Franklin, of Marion, Illinois, describes it in a recent edition of the *Illinois Bar Journal*.

The keystone of the system is a "Docket-Setting Committee" created in 1945 by the Bar Association at the request of Circuit Judge H. L. Zimmerman. That Committee, originally composed of three lawyers, now has five—two plaintiffs' attorneys, two defendants', and one the State's Attorney. At the request of the Committee, the clerk of the court regularly asks all lawyers to turn in a list of cases they'll have during the next term. The lawyers are asked to divide their cases into those to be set for hearing on the pleadings; those for trial, and, if for trial, those for a jury. The list is turned over to the Committee from four to five weeks before the term begins. The Committee then consults the judge as to his schedule, and then it consults lawyers as to their preferred dates. Then, it sets the jury cases. Non-jury cases are set for the week preceding the jury cases.

The system keeps the calendars almost current. Its secrets, according to Mr. Franklin, are co-operation of Bench and Bar; making up trial dockets at least thirty days before the actual trial settings begin; holding terms of court at regular, statutory periods, and allowance, by the trial judges, of sufficient time

for the work at hand. Mr. Franklin concludes that the system might not help much in Cook County, but he recommends it for every other county in Illinois.

Victor A. BRADLEY, Sr.

■ The Kentucky State Bar Association held its Annual Meeting for the year 1956, at the Kentucky Hotel in Louisville, commencing April 3. The opening session was the judicial banquet at which Walter V. Schaefer, Justice of the Illinois Supreme Court, spoke.

The opening assembly on April 4 heard E. Smythe Gambrell, President of the American Bar Association, in a stirring address.

At the Junior Bar luncheon on April 4, Robert Storey, Jr., of Dallas, Chairman of the Junior Bar Conference, spoke highly of Thomas C. Carroll of Louisville, and the excellent work Mr. Carroll has done in the Sixth District on the American Bar Association membership drive.

On the afternoon of April 4, J. Gregory Bruce, Washington, D.C., Judge of the United States Tax Court, presided at a demonstration of an estate tax case. This demonstration had been presented at the previous American Bar Association Annual Meeting and was received with great appreciation by the members of the Kentucky Bar.

At the banquet on the evening of April 4, some 500 lawyers, judges and their wives heard Dr. Frank A. Rose, President of Transylvania College.

The program on Thursday consisted of a real estate panel, a tort panel, presentation of senior certificates to attorneys who have practiced 50 years or longer, a Civil Rules panel, Alumni dinners, and was highlighted by a committee presentation and floor discussion of a minimum fee schedule for the lawyers in the State of Kentucky.

In the course of the meeting, the following officers were installed: Victor A. Bradley, Sr., Georgetown, *President;* D. Bernard Coughlin, Maysville, *President-Elect;* Richard L. Cornett, Glasgow, *Vice President,* and Henry H. Harned, Frankfort, *Secretary-Treasurer.*

■ Lawyers all over the country are showing that in the field of public relations, they can outdo the Madison Avenue boys anyday in the week.

In Los Angeles, for example, the City and County Bar Associations, the Pomona Valley Bar Association and ten affiliates recently set up a Bar Association Booth at the County Fair. Lawyers' wives staffed the booth, and Fair-goers picked up more than 15,000 pamphlets on the law and lawyers. The crowd also watched color slides from the film, "Living Under Law", and filled out questionnaires that showed people are interested in making a will, legal aid, landlord-and-tenant law and other subjects. The questionnaires also showed people thought the word "Bar" meant something different from the legal profession. The booth, located in the grandstand building underneath the racetrack stands, was undecorated except for the dull *mal-de-mer* green paint, which Joseph L. Wyatt, Jr., of the Los Angeles Bar Committee said is "surprisingly like a lawyer's office". The booth, a pioneer project in public relations, suffered from one important shortcoming: the model train across the aisle was "noisy and distracting".

The Florida Bar is working on another public relations idea. A committee of the Junior Bar Committee plans to promote the idea that people should have an "Annual Legal Check-Up". That notion, already embodied in a program in Michigan, will be carried out by The Junior Bar's Legal Check-Up Committee, composed of Joel R. Wells, Jr., and Steve M. Watkins, Co Chairmen; E. Drayton Fair, Stephen H. Grimes, and Richard Cours.

The professional public relations boys have tipped their hats to the work of The Kansas State Bar Association. The Public Relations Association of Kansas conferred its top award on the State Bar for public relations activity in 1955.

Mineral Law Institute at University of Colorado

■ The Second Annual Institute of the Rocky Mountain Mineral Law Foundation will be held at the University of Colorado, Aug. 2-4.

The foundation grew out of the first annual Rocky Mountain Mineral Law Institute held at the University last July when more than 600 persons from twenty-three states attended. Because of the regional sponsorship of seven bar associations, eight law schools and the oil and gas and mining industry, attendance is expected to exceed 600 this year.

Eighteen experts from throughout the nation in the field of mining, oil and gas and taxation law will speak at the Institute. Subjects they will discuss include mining leases, mineral reservations of railroads and local government bodies, current decisions and problems in the regulation of the independent natural gas producers, legal problems related to the development and utilization of atomic power and unitization in oil and gas development.

Arthur Thad Smith of the Continental Oil Co., Denver, is president of the Rocky Mountain Mineral Law Foundation. H. M. Gullickson, Denver, area counsel for the Shell Oil Co., will serve as general chairman of the Institute.

Edward C. King, dean of the School of Law at the University of Colorado, will serve as director of the Institute. Inquiries about the Institute should be addressed to the Rocky Mountain Mineral Law Foundation, University of Colorado, Boulder, Colorado.

Tax Notes

■ **Prepared by Committee on Publications, Section of Taxation, George D. Webster, Chairman; John S. Nolan, Vice Chairman.**

Refund Actions After Partial Payment

By William H. Bowen

■ The recent decision of the Eighth Circuit in *Bushmiaer* v. *United States,* 230 F. 2d 146 (8th Cir. 1956), held that a taxpayer is not required to pay the entire tax assessed by the Government as a condition precedent to bringing a suit for refund. This suggests a "third" remedy for a taxpayer wishing to resist a tax deficiency or recover excessive taxes paid, in addition to the usually stated choice of contesting the deficiency determination in the Tax Court or paying the tax and suing for refund in the District Court or Court of Claims. The taxpayer might pay only a small part of the tax and sue for refund. While the decision is interesting and the suggested hybrid course of action may prove useful under certain circumstances, it also has important limitations which must be considered.

In the *Bushmiaer* case the taxpayer paid $5,000 in partial satisfaction of 1942 and 1943 deficiency assessments totalling $137,989.28. The taxpayer thereupon filed claims for refund for the $5,000, and upon denial of the claims, a suit for refund was instituted in the District Court against the United States under the Tucker Act, 28 U. S. C. 1346. The complaint requested a judgment of $5,000 plus interest and costs, and the taxpayer asked for a jury trial. The Government moved to dismiss the complaint on the grounds that: (1) the District Court had no jurisdiction because the Tucker Act required full payment of the tax assessed as a prerequisite to an action based on the jurisdictional authority recited therein; and (2) the complaint in showing on its face that full payment had not been made failed to state a cause of action.

The District Court granted the Government's motion, relying for the most part on statements in several cases that federal taxes must first be paid before suit for refund may be instituted. *Cheatham* v. *United States,* 92 U. S. 85 (1876); *Suhr* v. *United States,* 18 F. 2d 81 (3d Cir. 1927); and *Friebele* v. *United States,* 20 F. Supp. 492 (D.C.N.J. 1937). The Court also quoted from a report of the House Ways and Means Committee stating the reasons for creation of the Board of Tax Appeals in 1924, as follows:

> The committee recommends the establishment of a Board of Tax Appeals to which a taxpayer may appeal prior to the payment of an additional assessment of income, excess-profits, war-profits, or estate taxes. Although a taxpayer may, after payment of his tax, bring suit for the recovery thereof and thus secure a judicial determination of the questions involved, he can not, in view of section 3224 of the Revised Statutes, which prohibits suits to enjoin the collection of taxes, secure such a determination prior to the payment of the tax. The right of appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous and which may have, since its receipt, been either wiped out by subsequent losses, invested in non-liquid assets, or spent, sometimes forces taxpayers into bankruptcy, and often causes great financial hardship and sacrifice. [H. R. Rep. No. 179, 68th Cong., 1st Sess. 7 (1923)].

The Court concluded from these authorities that Congress intended to create a system whereby the taxpayer could either contest the deficiency determination in the Tax Court or pay the tax and sue for refund. The taxpayer could not take the "in-between" step of paying part of the tax and suing for refund, because the District Court had no jurisdiction in such case. *Bushmiaer* v. *United States,* 131 F. Supp. 589 (W. D. Ark., 1955).

William H. Bowen

The Eighth Circuit reversed, holding that the District Court had jurisdiction because the case came within the meaning of the Tucker Act which applies to any civil action against the United States for the recovery of any internal revenue tax or penalty alleged to have been erroneously or illegally assessed or collected. The Court also held that the complaint stated a cause of action, distinguishing as *dicta* the statements in the cases relied upon by the District Court. Instead, the Court cited with approval the cases of *Coates* v. *United States,* 111 F. 2d 609 (2d Cir. 1940); *Sirian Lamp Co.* v. *Manning,* 123 F. 2d 776 (3d Cir. 1941); and *Hanchett* v. *Shaughnessy,* 126 F. Supp. 769 (N.D. N.Y. 1954). The *Sirian Lamp* and *Hanchett* cases had also held that partial payment will support a suit for refund; the *Coates* case, while involving some factual differences, supported the same conclusion.

A dissenting opinion in the *Bush-*

(Continued on page 681)

(Continued from page 604)

qualms would now subscribe to the creation of a "student associate membership", which could be maintained on a separate roster looking to transfer to real membership upon admission to the Bar and the filling out of the usual membership application blank for the permanent records of the Association. There are almost 50,000 law students in this country who ought in a more formal way to be a part of the Association. Approximately 10,000 are ripening into lawyers each year, and there ought to be some easy and automatic way to bring them into full membership. We are told that in 1961 the number of law students will stand at approximately 75,000 and that the annual crop of new lawyers will increase to around 15,000. In this lies our hope for the rapid increase of membership in the Association and the attainment of our goal of at least 200,000 members within the next five years. It would be helpful if our leaders would get together with the American Law Student Association and the Junior Bar Conference and evolve a satisfactory plan which would make the most of these oncoming generations and given them the opportunity to which they are entitled.

Members expecting to attend our 1956 Annual Meeting in Dallas, or our 1957 Annual Meeting in New York and London, should register at Association Headquarters without delay. Those registering now for the Dallas meeting will be assured of air-conditioned hotel rooms and that their names will be included in the printing of the advance registration list for the convenience of their friends who will want to get in touch with them. Attendance at the Dallas meeting will be greater than that at any previous Annual Meeting. Registration before July 1, 1956, is an absolute necessity for those planning to attend the London meeting. To clarify the registration procedure, it may be said again that each state will have its pro-rata allocation from the 5,000 to be accommodated in London and that, if there is an excess demand, as seems likely, the screening for the quota of each state will be determined on an impersonal consideration of the applicant's regularity of attendance at annual meetings during the past five years. The first General Session of the 1957 meeting will be the President's Reception in New York on Sunday afternoon, July 14, and the first Assembly Session will be Monday morning, July 15, to be followed by sessions of the House of Delegates on the afternoon of July 15 and on the morning and afternoon of July 16. Sections may meet in New York on Friday and Saturday, July 12 and 13. It is expected that there will be Assembly Sessions and House of Delegates sessions in London and that most of the Sections and many of the Committees will have sessions and conferences in London as well as in New York. Boat movements will commence for some as early as July 10 and continue almost daily through July 17 —the members of the House of Delegates, and their wives, and other officialdom being scheduled to leave New York on the latter date to arrive in London on July 22. Those planning to sail on one of the earlier boats under our arrangements will have a few days in and around London before the formal opening of our London sessions on July 24. It is contemplated that the London program will extend from July 24 to July 31, during which time there will be a wide variety of professional ceremonials, Assembly sessions, House of Delegates sessions, institutes, seminars, Section sessions, receptions, visitations, and other gatherings, including a special feature at Runnymede in recognition of our common heritage of liberty under law. Details regarding the program for New York, London, Edinburgh, Dublin, Paris and Rome will be published at an early date.

The visitations during the month of May have continued to be interesting and stimulating:

At the instance of American Bar Association members Henry M. Robinson and Henry P. Dart, I addressed the New Orleans Rotary Club. This is one among many fine organizations to which it is a privilege to tell the lawyer's story.

The brilliant dinner meeting of the Council of the Virginia State Bar in Richmond was well attended by leading lawyers, judges and law teachers from all sections of the state. President Aubrey R. Bowles, Jr., and Mrs. Bowles gave a delightful garden party at their home immediately preceding the dinner. The hospitality of President Bowles, Lewis Powell, Alex Parker, Jack Herod, David Sutton, Thomas B. Gay and their colleagues will long be remembered.

Law Day at the University of Tennessee under the able direction of Dean William Wicker gave me an opportunity to become acquainted with that great institution. Preceding the banquet, the Knoxville Bar Association held a beautiful reception at which President Joseph A. McAfee very graciously introduced me to its members. President Weldon B. White of the Tennessee Bar Association, Walter P. Armstrong, Jr., of Memphis and many other state bar leaders joined in the festivities which reached a climax in the banquet presided over by student leader James Webb.

The Annual Meeting of the Rutgers Law School Alumni Association in Newark brought together many distinguished New Jersey lawyers, judges and law teachers. Association President Alexander P. Waugh, President Elect Wilbur A. Stevens, Rutgers President Lewis Webster Jones, Dean Lehan K. Tunks, Chief Justice Arthur T. Vanderbilt, Richard Congleton, Samuel S. Saiber and a host of others were most hospitable at the reception and the banquet.

The Annual Meeting of the rapidly growing Florida Bar at Hollywood was, as usual, an impressive gathering. President Donald K. Car-

roll, Thomas F. Fleming, T. M. Shackleford, Jr. and numerous other leaders produced a program of constructive work and topflight Florida amusement.

The Annual Dinner of the Kemper Insurance Men's Club in Chicago brought together not only some 600 members of that organization but also a large coterie of outside bar leaders and business men. Under the leadership and inspiration of club President Edmund J. O'Brien and former Ambassador to Brazil James Scott Kemper and his able colleagues, this was a memorable gathering of high conviviality.

At the two-day spring meeting of our Board of Governors in Chicago many important matters, reported elsewhere, came up for action. Immediately preceding that meeting, we had a session of the Administration Committee of the Board and likewise a meeting of the Directors of the American Bar Foundation.

The Annual Banquet of the Bar Association of the Seventh Federal Circuit in Chicago took the form of a farewell party in honor of retiring Chief Judge J. Earl Major of that Circuit. The presence of distinguished members of the Supreme Court of the United States and the Seventh Circuit Court and other courts made this a colorful occasion. President Sidney Neuman, Secretary Walter J. Cummings, Jr., Dinner Chairman Morton Schaeffer, State Delegate Ben Wham and many other bar leaders worked together to make this a delightful gathering.

The Annual Banquet of the Milwaukee Bar Association, presided over by President John A. Kluwin, was an inspiring event. President Kluwin, Secretary L. G. Barnes, Gerald P. Hayes, Jackson M. Bruce and their colleagues continue to dispense the kind of hospitality that "made Milwaukee famous".

The Annual Meeting of the Iowa State Bar Association at Des Moines, under the leadership of President Henry J. TePaske, Secretary Edward H. Jones, Program Chairman S. David Peshkin, and their fellow executives, was of highest order. The thick brochure containing the program dealing with agricultural law, probate law, medico-legal problems, and numerous other timely subjects stands alone in this country for excellence. Bar leaders everywhere would do well to obtain copies of it for study and reflection. It was good to see again these state bar officials and Burt J. Thompson, Ingalls Swisher, Owen Cunningham, Clyde Jones, Harold Newcomb, Judge Thomas J. Guthrie and a host of other old friends who are national pace setters in bar organization work.

I happily was able to attend the last day of the Annual Meeting of the Georgia Bar Association in Savannah. Our beloved President Henry L. Bowden and his colleagues have had a most fruitful year of leadership. In the list of many fine speakers at this enjoyable meeting was the dynamic Luther Bang who achieved signal success as Minnesota State Chairman in our recent membership campaign.

The splendid Pacific-Northwest Regional Meeting in Spokane rounded out the month for me. Under the American Bar Association leadership of Charles S. Rhyne and James C. Dezendorf and the local leadership of Dean Smithmoore P. Myers, State Delegate Richard S. Munter and many others from the region, including Justice E. B. Smith, Franklin Riter, Julius J. Wuerthner, Glenn R. Jack, Alfred J. Schweppe, Tracy E. Griffin, Harold Sheffelman, James T. Finlan, Hugh Biggs, Willis E. Sullivan, John Manders and Edward V. Davis, the meeting rates as one of our best in educational content as well as in inspiration and entertainment.

May I again remind you of the new members breakfast we are having at 8 o'clock on Monday, August 27, in the ballroom of the Statler-Hilton Hotel in Dallas as the opening event of our 1956 Annual Meeting. In order to re-assess our position and welcome our new members, we are urging them and all of those who worked in the membership campaign and all of our officers and board members to make their reservations and be in attendance at this important function which will adjourn promptly at 9:30, after five-minute talks by several leaders who have earned the right to speak on such an occasion.

Group Life Insurance for Members over Fifty Not Available in Ohio or Texas

On page 462 of the May issue of the JOURNAL, there was an announcement of the Association's new group life insurance plan for members 56 and older. The announcement should have stated that this plan is not open to members in Ohio and Texas under the present insurance regulations of those states.

OUR YOUNGER LAWYERS

William C. Farrer, Secretary and Editor-in-Charge, Los Angeles, Calif.

Annual Meeting, Dallas, Texas, August 24-27, 1956

■ With "easy hospitality" as its theme, Chairman Robert G. Storey, Jr., and the Annual Meeting Committee, headed by Dallas Junior Bar President Timothy E. Kelley, announce Conference plans for the Annual Meeting in Dallas, Texas, Friday, August 24, through Monday, August 27.

Hotel Arrangements Chairman Charles Hall promises the accommodations at the Baker Hotel will be the finest secured for any Junior Bar Meeting. This air-conditioned hostelry is located in the heart of downtown Dallas and serves as locale for all Junior Bar Meetings and social events, and is but a few short blocks from American Bar Association Headquarters at the Statler-Hilton.

All lawyers 36 years of age and under attending the Meeting are urged by Registration Co-Chairmen Harold Berman and David M. Kendall, Jr. to register Friday morning, August 24, on the Mezzanine Floor of the Baker, and are cordially invited to attend Council Meetings, General Sessions, Workshops, and social events during the conclave.

On Friday morning the Junior Bar Conference Board will meet, followed that afternoon by a meeting of the Executive Council, with circuit reports and reports of special committees the first order of business.

Friday evening a multi-host candidates' cocktail party open to all will be given at the Dallas Bar Association Club in the Adolphus Hotel. Tickets for local entertainment features will be reserved and available to all. Hospitality Chairman Walter M. Spradley reports that the Hospitality Room in the Baker Hotel will be open on Friday noon, with refreshments available during the course of the meeting.

Breakfast in the Texas Room is scheduled for Saturday morning, August 25, followed by the first General Session of the Conference, presided over by Vice Chairman C. Frank Reifsnyder of Washington, D. C., at which time committee chairmen will report. Concurrently Committees on Nominations, Awards of Merit, and Resolutions will conduct their sessions.

Workshop Program

On Saturday there will be a workshop program with delegates from state and local groups, presided over by the National Secretary, in the Texas Room. This meeting is designed to give State Delegates and all others who desire to attend an opportunity to exchange ideas for bar association activities and organizational efforts. The program for this meeting is under the supervision of Bryce M. Fisher, of Cedar Rapids, Iowa, Vice Chairman of the Junior Bar Conference Affiliate Units Committee.

A highlight of the Saturday session will be the Annual Junior Bar Conference Luncheon with its principal speaker, W. St. John Garwood, Associate Justice of the Texas Supreme Court, who has a wide reputation as a talented speaker.

Later in the afternoon the second General Session will convene, at which time the Report of the Nominating Committee will be given, followed by the election of officers and Executive Council members.

Chairmen's Reception

In the evening Chairman Robert G. Storey, Jr., will be the host at a reception for all Conference Members in attendance followed by the Annual Dinner Dance in the Terrace Room of the Baker Hotel, the arrangements for which have been made by Ben Pickering and Richard Jones.

The Executive Council and Workshop Meeting will continue Sunday afternoon, and on Sunday evening, August 26, the Dallas Junior Bar Association will entertain at a steak supper and dance at one of Dallas' finest suburban supper clubs.

Monday, August 27, the Annual Personal Finance Debate, with four outstanding members of the Junior Bar as participants, will be held at 4:00 o'clock P.M. in the Terrace Room. This will be followed by a reception in honor of judges and participating counsel. Other members of the Annual Meeting Committee assisting Chairman Kelley include: Publicity, Larry Taylor, Jr.; Special Events, Frank Norton and Wayne Melton; and Executive Committeemen Joe Matthews, Jack Brady and Harold Clark.

Participants Selected for Personal Finance Debate

Commencing at the Annual Meeting in 1947, the Conference on Personal Finance Law has each year invited four outstanding members of the Junior Bar to participate as counsel in an appellate court argument held during the Annual Meeting. On Monday, August 27, the tenth in this series will be held, and the question to be argued is "Does the purchase of a conditional sales contract by a finance company become a loan because the finance company participates in the making of the contract?". Participants selected for this year's debate include as counsel for the plaintiff: William J. Fuchs, of Philadelphia, Pennsylvania, Junior Bar Conference Chairman for the 1955 Philadelphia Annual Meeting Committee, and a Past Chairman of the Pennsylvania Junior Bar; and Donald Maroldy, of New York City, Junior Bar Conference Chairman for the Second Cir-

cuit in the Special Membership Drive and a member of the Executive Council of the New York Young Lawyers Section. Harold W. Tobin, of San Francisco, California, Chairman of the Junior Bar Conference, Procedural Reform Committee and Secretary-Treasurer of the California Junior Bar Conference, and E. Lawrence White, of Spokane, Washington, Junior Bar Conference Metropolitan Chairman in the Special Membership Drive, are counsel for defendant.

The judges for the 1956 Annual Argument will be J. E. Hickman, Chief Justice of the Supreme Court of Texas; Dean Robert G. Storey of the Southern Methodist University School of Law; and Eugene C. Gerhart, of Binghamton, New York.

A reception in the Terrace Room of the Baker Hotel in honor of the judges and participating counsel will be held immediately following the argument and the presentation of the award to the winning side. All registrants are invited to attend the argument and the reception.

CHAIRMEN OF JUNIOR BAR CONFERENCE SPECIAL COMMITTEES AT MID-YEAR MEETING IN NEW ORLEANS, LOUISIANA. Standing, left to right: James J. Bierbower, Washington, D. C., Military Service Committee; Charles F. Malone, Roswell, New Mexico, Scope and Correlation Committee; F. Hastings Griffin, Jr., Philadelphia, Pennsylvania, Liaison with Canadian Junior Bar Conference. Sitting, left to right: Alvin B. Rubin, Baton Rouge, Louisiana, By-Laws Committee; Payne H. Ratner, Jr., Wichita, Kansas, Medico-Legal Committee; and C. Severin Buschmann, Jr., Indianapolis, Indiana, Activities Committee.

Tax Notes

(Continued from page 677)

miaer case considered that the various statutory sections (26 U. S. C. 7421, 7422; 28 U. S. C. 1346) established a clear pattern that the taxpayer was either to resist the deficiency determination in the Tax Court or pay the full assessment and sue for refund.

The Government in all these cases expressed a fear that as a result of allowing a taxpayer to file suit in the District Court after only part payment, the ability of the Government to collect its taxes would be impaired. It was also suggested that the result might be a shifting of the bulk of tax litigation from the Tax Court to the District Courts. (Compare the Dolliver Bill, H. R. 150, 83d Cong., 1st Sess., which in effect would confer concurrent jurisdiction with the Tax Court upon the District Courts following the mailing of a deficiency notice).

The Court of Appeals in the *Bushmiaer* case pointed out that these fears were unfounded because of the veritable arsenal of tax collecting devices which Congress has conferred on the Treasury Department for summary collection of taxes. Section 272 (a) of the 1939 Code Provides that where a petition has been filed in the Tax Court no distraint or proceding in court for collection of the tax shall be made or prosecuted until the decision of the Tax Court has become final. If no petition has been filed, Section 272 (c) provides that the deficiency shall be assessed and then shall be paid on notice and demand by the collector. Thus, the Court considered that where only part payment had been made and a suit for refund filed, the Government could assess and collect the unpaid balance.

Once the taxes are assessed, the Government has a tax lien equal in rank to a judgment lien without the necessity of obtaining a judgment, and execution can be effected upon the lien. Thus, the taxpayer paying only part of the tax puts his property during the pendency of the action for refund at the mercy of the tax collector. For most taxpayers, unable or unwilling to pay a large assessment, this means that they will not forego their opportunity to proceed in the Tax Court where they are secure from such action.

Since the Govenment continued to resist the filing of refund suits based on partial payment after the *Sirian Lamp* and *Hanchett* decisions, it may continue to do so notwithstanding the *Bushmiaer* decision. Meanwhile, there is some danger that the Government will attempt to discourage such actions by exercising its power to collect the unpaid balance of the tax, by levy and distraint if necessary, although a suit for refund based on partial payment has been filed.

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe • Editor-in-Charge

FORENSIC SCIENCES: In January, 1956, there appeared a new legal periodical we should all know about. So much depends in this business of ours on merely knowing of the existence of certain source materials. The magazine is called *Journal of Forensic Sciences.* It is published by the Callaghan Company of Chicago as the official publication of the American Academy of Forensic Sciences and the first issue (Vol. 1, No. 1, January, 1956) contains a number of articles that were originally presented at the annual meetings of the Academy in Chicago in 1953 and 1954 and in Los Angeles in 1955.

You may or may not be so poorly informed as I about "Forensic Sciences". If so, it will be news to you as it was to me to discover the word "forensic" comes from the Latin "forum" that means "market-place". For some reason "forensic" means "pertaining to courts of justice or to public disputation". Other meanings are said to be: "relating to or used in judicial proceedings" or "belonging to public debate or discussion" or "argumentative".

The Academy has seven sections: "Pathology", which deals with analyses of the human body to determine the cause of death or injury; "Toxicology", which concerns not only the effects of poison on the human body but also such things as developing chemical tests to determine intoxication; "Psychiatry", which concerns insanity and lesser mental ailments; "Immunology", which seems to include the new "Rh" blood test (so named after the Rhesus monkey) under which in almost 55 per cent of the cases, paternity can be excluded and also which permits identification of criminals by blood analysis; "Questioned Documents" which permit detection of forgeries; "Criminalistics", which seems to include police laboratories, fingerprinting, ballistics, tire impressions, physical measurements, photography (ultra-violet and X-ray), microscopy, spectrophotometric and an endless list of others; and last but greatest of all "Jurisprudence." (See editorial of George E. Hall, pages 1-2).

The President of the Academy is Fred E. Inbau, of Chicago, and he writes a message as does the Callaghan Company. The address of the magazine is 6141 North Cicero Avenue, Chicago 30, Illinois, the Callaghan office, but manuscripts go to Dr. Samuel A. Levinson, the Editor, at 808 South Wood Street, Chicago 12, Illinois. The *Journal* will be published four times a year, but the price of an issue or subscription is not stated in this first number.

The leading article is by Dr. Alexander O. Gettler, Chief Medical Examiner of the City of New York, and from the files of his office he writes most interestingly and gruesomely of New York murders solved by toxicology (pages 3-25). Dr. Theodore J. Curphey, of Hempstead, New York, writes on "Trauma and Tumors" (pages 27-35). He is the Chief Medical Examiner of Nassau County's Meadowbrook Hospital. By far the most unusual piece is the one by C. B. Hanscom, Director of the Department of Protection and Investigation of the University of Minnesota. Listen to this:

> Many are aware that the majority of my experience in the field of detecting deception has been with the polygraph. Frequently I have been asked about the limitations of this instrument and about the difficulties in interpretation of some of the recordings. At times we have been confronted with suspects with low mentality, and with others who produce *"inconclusive charts,"* as they have been called.
>
> But, on the 28th of September 1948, I began one of the most interesting experiences in more than 25 years in the field of investigation.
>
> In essence, a young man with a long record of arrests and convictions was charged with the brutal murder of a boy and girl he surprised in unusual circumstances on a golf course. The conviction of this man finally depended upon locating the murder rifle. Our polygaph examinations disclosed his guilt, and he reacted to any possible location of the rifle which involved a body of water. We were at a loss to select the correct lake, river, or pond into which we could send divers.
>
> In desperation we turned to the only other method of investigation we had not tried in this case—an interrogation of the suspect while he was influenced by anesthetic drugs! After three or four hours of questioning we had a complete confession of the crime, a description of the location of the gun, and the post-hypnotic suggestion that the suspect actually would lead us to the spot from which he threw the weapon into the pond! As promised, he helped us locate the rifle, and the case was prosecuted successfully. More than thirty different tests under narcosis have followed this dramatic beginning. They have been concluded to our satisfaction and been validated by the facts subsequently disclosed. We have no evidence of a failure in the series! Although this record is unusual, the Minnesota technique is based upon a firm historical background.

Reading the above and the balance of the article one cannot but wonder about the desirability and legality of such tests. Surely, like the lie detector the defendant has to consent. But where he does the method seems deadly, a brain-washing by drugs and hypnosis and in comparison the jury recordings of the University of Chicago seem mild indeed. Mr. Hanscom calls his piece "Narco Interrogation". I gather the mental state induced by drugs or hypnosis is referred to as "narcosis", from which is derived "narco-analysis" or interrogation. An interesting

and informative piece (pages 37-45).

Drs. Milton Feldstein and Niels C. Kendshoj, of the University of Buffalo, write on "Rapid Spectrophotometric Method for the Determination of Morphine in the Urine" (pages 47-56). Colonel Calvin Goddard writes on "The Unexpected in Firearm Identification" (pages 57-64). There also appears a symposium on "The Traumatic Neuroses: Medicolegal Puzzle" in which Drs. Maier J. Tuchler and Edmund D. Leonard of San Francisco, Dr. Walter Bromberg and Patrick J. McCarthy, of Sacramento, Dr. Karl O. Von Hagen, of Los Angeles, and Dr. Walter Z. Baro, of Azusa, participate (pages 65-100). Harry M. Ashton, of Cincinnati writes on "Questioned Documents and the Law" pages 101-110. He is an Examiner for the Postal Inspection Service. The January issue concludes with "Forensic Pathology Slide Seminar" (pages 111-125) by Dr. Arnold F. Strauss, of Norfolk, Virginia. This is the first of several reports Dr. Strauss will publish.

An interesting feature is the preview (page 127) that the Editor, Dr. Samuel A. Levinson, gives. It seems future issues will discuss age, blood grouping, electric shock, violent death, subarachnoid hemorrhage, identification of human remains, alcohol and intoxication, privileged communications, irresistible impulse, questioned documents, gunshot through glass, psychiatric treatment of inmates and spectrographic identification of noxious elements (thorium and silicon) in biopsy tissues. All seven departments of the Academy seem well covered except jurisprudence. Notable by their absence are articles by Lon Fuller or Roscoe Pound.

Lawyers whose cases fall in this field will find this *Journal* invaluable.

INDICTMENT: Henry Brown, of Harvard Law School, has a note in the December, 1955, issue of the *Harvard Law Review* with respect to *United States* against *Frank Costello,* (221 F. 2d 668, conviction affirmed, 350 U.S. 359). In affirming the conviction, according to the note writer, the Second Circuit "held an indictment founded on hearsay alone is not invalid". Before the Supreme Court of the United States, therefore, the case involved a very interesting and important question of how much and how good quality evidence a United States District Attorney must present to a grand jury in order to obtain an indictment. Brown finds that although a Connecticut District Court in 1914 dismissed a federal indictment where incompetent evidence had been presented to the grand jury, most federal courts have been reluctant to consider allegations either that some of the evidence presented to the grand jury would have been inadmissible at trial or that there was insufficient admissible evidence to support a finding of probable cause. The note writer says that "since the return of the indictment may have a disasterous effect on a person's reputation in business, a high standard of reliability should be maintained". There is, however, no discussion of the facts of the Costello case. The note is valuable in calling to the attention of criminal lawyers a point that may affect federal indictments from coast to coast. (Vol. 69, No. 2, page 383. Address: Harvard Law Review, Gannett House, Cambridge, Massachusetts, and send $1.60.) The 1956 *Catholic University Law Review* (No. 2) notes the Supreme Court decision (1326 18th Street, N.W., Washington 6, D. C. Price $2.00)

STREAM POLLUTION: *"Statutory Treatment of Industrial Stream Pollution"*. This article by W. B. Smith deals with the problem of stream pollution and the remedies available at common law and equity, as well as the proposed statutes in various states. The author treats with the constitutionality of such state agreements and with the applicability of interstate compacts and federal legislation as a possible solution. He analyzes the United States Water Pollution Control Act and its pertinent provisions. Volume 24, Number 3, January, 1956, page 302-319. (Address: George Washington Law Review, 720 Twentieth Street, N.W., Washington 6, D. C. Single copy price: $1.00)

EVIDENCE: The Spring, 1956, issue (Vol. 10, No. 3) of the *Rutgers Law Review* devotes itself to the new uniform rules of evidence recently approved by our Association. In it are the following leading articles: General Provisions, by Nathan L. Jacobs, Associate Justice of the Supreme Court of New Jersey; Judicial Notice, by Robert E. Knowlton, Professor of Law, Rutgers University; Presumptions, by Edmund M. Morgan, Professor of Law, Vanderbilt University; Witnesses, by Mason Ladd, Dean of the State University of Iowa College of Law; Privilege Against Self-Incrimination, by Alfred C. Clapp, Senior Judge, Appellate Division, Superior Court of New Jersey; Extrinsic Policies Affecting Admissibility, by Judson F. Falknor, Professor of Law, University of California; The Opinion Rule, by Lewis Tyree, Professor of Law, Rutgers University; Hearsay, by Charles T. McCormick, Professor of Law, University of Texas; and Authentication and Content of Writings, by A. Leo Levin, Professor of Law, University of Pennsylvania. A Foreword was written by Judge Charles E. Clark of the United States Court of Appeals, Second Circuit.

Every one of these writers is well known and Professor Charles T. McCormick was Chairman of the Drafting Committee. Lawyers will want his new one-volume book on evidence published by West Publishing Company. (Address: Rutgers University Press, 30 College Avenue, New Brunswick, New Jersey; single copy price: $2.25.)

(Continued from page 616)

work of the Court reasonably requires such assistance.

In March, 1956, this last mentioned provision was before the Supreme Court of Oregon and it was held to be unconstitutional, *State* ex rel. *Madden* v. *Crawford*, 62 Ore. 511.

Judge George Rossman, of the Supreme Court of Oregon, reports that many attorneys have been appointed as *pro tempore* circuit court judges and their services have helped to relieve congested dockets.

In 1949, the Supreme Court of New York in New York and Kings Counties had a backlog of about 27,000 cases.

In that year, the legislature authorized a transfer of cases from the Supreme (superior) Court to lower courts if the parties consented to the transfer and to the reduction of the claimed damages to a sum within the jurisdiction of the lower court.

In the following six years, this backlog was reduced by about 17,000 cases by the use of preferences, general calendar calls, conferences with a judge while the cases were pending and by transfers to lower courts.

The first step taken was to set up such conferences to which cases in the backlog were referred for the avowed purpose of ending as many as possible without trial and of transferring others to a lower court on consent.

To facilitate such transfers, preference was given to cases which were rightfully in the Supreme Court and refused to cases which should have been brought in lower courts.

No case that rightfully belonged in the Supreme Court was refused a preference.

To aid in this process it is now required that the notice placing cases on the docket be accompanied by a copy of the pleadings and of the bill of particulars with a certificate of accuracy by counsel. The court in Kings County, in personal injury cases, requires, in addition, a doctor's affidavit as to the nature and extent of the injuries involved, with a prognosis.

A case not preferred remains on the general calendar and may never be reached for trial in the Supreme Court unless an appeal from the preference order is granted. In most instances the plaintiff removes the case to a lower court. Appeals of this sort are practically unknown.

In Kings County the conferences for discussion of pending cases with a judge have been held both in chambers and in courtrooms. In New York County they have been held in rooms adjoining the courtrooms. Judges specially qualified to conduct such conferences have been assigned to that work for long periods.

In 1953, the court in Kings County began to process its backlog cases by use of general calendar calls. On these calls, it requires cases to be answered either "settled", "transferred" or "ready". Each call lasts about a month and in that time no trials are held. One judge calls the calendar. The others are assigned to conferences to which the cases marked "ready" are referred by the calendar judge. There they are discussed for the purpose of disposing of them finally.

On the first of these calls in 1953, 10,818 cases were called with the following results: 2,910 were settled 1,128 were transferred to a lower court. In 213 the venue was changed, 515 were dismissed and 227 were off the calendar for various reasons. 5,018 remained in the backlog.

The second call was held in 1954. It disposed of 2,238 cases leaving a backlog of 4,021.

The third call in 1955 left a backlog of about 5,000 cases which still exists.

A fourth call is in progress at the time of writing, June, 1956.

In New York County the sending of backlog cases into conference with a judge continues. One conference is held soon after issue and, if the case is not settled, another shortly before the trial begins.

In 1955 the legislature authorized the transfer of cases from the Supreme Court to lower courts without consent of the defendant's counsel. (Civil Practice Act §110b) The new cases and the backlog cases in these two courts in recent years are shown in the footnote.[6]

The transfer of cases to lower courts has had a significant effect on backlogs for it has reduced the number of new cases in the Supreme Court since lawyers, realizing that cases in that court which do not belong there may never be reached for trial, now bring such cases in lower courts in the first instance.

In the past three years the court in New York County has been using a panel of about ninety-five physicians, designated jointly by two medical organizations in New York City, who may be called on for independent, impartial testimony in personal injury cases which make up about 80 per cent of the cases pending in this court.

The expense involved is paid by the city. In January, 1956, Macmillan & Co. published a 188-page book, *Impartial Medical Testimony* which describes the use which has been made of this panel. Presiding Justice David W. Peck reports that the use of the panel has reduced the trials of personal injury cases by about 50 per cent by reason of the settlements which result.

These methods have been effective

6. The figures for Kings County are:

Year	New Cases	Backlog
1948	7,267	10,196
1949	7,971	13,099
1950	6,048	12,136
1951	6,190	11,627
1952	5,643	10,802
1953	5,499	10,867
1954	2,086	4,421
1955	4,107	5,001

Corresponding figures for the Court in New York County follow:

1945	5,711	6,437
1946	7,574	8,854
1947	8,898	11,991
1948	10,231	13,862
1949	8,551	14,089
1950	7,176	13,436
1951	6,846	13,066
1952	5,580	7,749
1953	5,498	6,038
1955	4,542	5,403
1954	5,364	6,037

For assistance in assembling these and other statistical data the writer is much indebted to Mr. Rubin H. Marcus of the New York Bar.

but as of June, 1956, there is a backlog in each county of about 5,000 cases, jury and non-jury.

The Federal Court . . . *An "Appalling" Backlog*

At the beginning of the court year 1955-56 the United States District Court in the Southern District of New York had a backlog which one of its judges called "appalling". It contained over 10,000 civil cases.

In October, 1955, the court ordered the parties in some 6,000 backlog cases to file a "Notice of Readiness" or "Non-Readiness". In only 13 per cent of them did both sides answer "ready". Judge Irving M. Kaufman of this court states that he found it necessary to call about twenty cases to get one that was ready for trial although some of the cases called had been on the docket for three to five years or more.

In October, also, a process of screening for "deadwood" cases well in advance of trial was inaugurated. Two judges were assigned as calendar judges. To them were referred, for conference, about 100 cases a day. The conferences were informal being held either in the courtroom with a judge sitting at the counsel table or in rooms off a courtroom.

At these conferences the cases were reviewed by counsel and the judge. Pre-trial-discovery was considered. The case was set for further conferences if necessary. Settlement and other possible disposition of the action were considered. If a plaintiff had failed to prosecute his case diligently it might be dismissed. At the end of the conference, if a case was not disposed of, it was placed on a ready calendar for trial. About 10 per cent went to trial. In four months approximately 3,000 cases were ended by settlement, discontinuance, dismissal or trial.

One judge called 1856 non-jury cases in two months. Ten per cent were ready, 30 per cent were settled, another 30 per cent were unprepared and marked off or adjourned. Others he dismissed or they were discontinued. To assist in this housecleaning, judges normally assigned to other work in the court were used for trials.

This court now provides by rule that no case may be placed on a trial calendar until after a statement of preparedness has been filed which will show that issue has been joined; that defendent has examined the plaintiff, if he desires; that necessary physical examinations have been made and discovery proceedings completed; that the case is ready for trial; and that the parties have discussed settlement or the reason why that has not occurred.

This court now has a docket of over 8,500 open cases of which about 2,200 are on trial calendars. In all likelihood however only about 10 per cent of these cases will be ended by trial.

Undoubtedly there are effective methods for dealing with backlogs which are not mentioned here but perhaps enough has been indicated to show that there seems to be a change of attitude toward them and toward efforts of the courts to end cases without trial.

Of this trend the California Judicial Council said in 1954: "The settlement approach to litigation is gaining strong advocates throughout the country. The definite theory is developing that our courts owe our citizens services in addition to merely providing a forum for the litigation of a dispute; that the court should offer its impartial services to aid the litigant in compromising disputes under proper circumstances, always being careful to preserve the full trial day in court should that prove necessary. This theory contemplates that the trial of a case is a last resort and should only eventuate if reasonable compromise opportunities have been exhausted."[7]

The solution of the backlog problem has been prevented largely because of the unnecessary rigidity of our court systems. This may well be one of the reasons behind a finding of a committee of the Chamber of Commerce of Boston, Massachusetts, on judicial procedure which reported in 1954 that: "No public, no private organization could render efficient service under the methods by which justice is administered in this Commonwealth. The courts, charged with one, and not the least important, of the three branches of our Government, are prevented from exercising their normal function, and are thus kept out of contact with a primary need of the people."[8]

Up to recently backlogs were regarded as inevitable and unavoidable. Not so today. Recent developments in court methods seem to warrant the belief that backlogs can be reduced to a size which will not be unfair to the public.

The solution of the problem is not pre-trial or conference procedure, or studies or commissions or restatements or more judges. It is the cultivation of a spirit in the Bar and on the Bench of a willingness to consider constructive changes in court methods candidly, and to make them effective if they will help to give the public better service.

The writer will long remember a luncheon of about 1,000 lawyers at which efforts were being made to encourage the use of methods to reduce court delay. At the end of the luncheon a popular judge made an address during which he said that he did not like, as he put it, "Hurry, hurry, hurry" in the courts. Whereupon napkins were thrown in the air and the room resounded with cheers. It was a spontaneous, eloquent, unrehearsed expression of the love of the lawyer for procrastination and his indifference to the old maxim that "Justice delayed is justice denied." So long as this attitude remains, backlogs are inevitable and procrastination, delay and postponement will continue to be popular tools of the Bar.

We still hear scornful references, even in high places, to judges who help litigants to end their cases without trial as "glorified adjust-

7. Rep. California Judicial Council 1954, page 18.

8. Rep. Massachusetts Judicial Council 1954, page 10.

ers"; but to the layman it is natural, proper and essential that judges should assist to this end; and there is increasing resentment of the criticism that has been levelled at lawyers and judges who have advocated such methods. However, this criticism seems to be disappearing, and perhaps in time backlogs will begin to disappear and where they now exist, justice will no longer be denied by delay.

Self-Incrimination

(Continued from page 636)

all, against invasions of such liberties as freedom of speech, religion and the ballot, or the exemptions of double jeopardy and self-incrimination. It is not without significance that, in giving their reasons for defying their king, the men of 1775 should have declared: "In our own native land, in defence of the freedom that is our birthright, and which we ever enjoyed till the late violation of it—*for the protection of our property, acquired solely by the industry of our forefathers and ourselves,* against violence actually offered, *we have taken up arms.*"[16] By allowing the immunity to be invoked where one type of liberty is involved but not the other, we convict ourselves of a serious inconsistency, and it would appear that we should permit it to be employed as a safeguard for both alike or for neither.

The present demand for maintaining the self-incrimination privilege emanates from three principal considerations. The first of these is our traditional and perhaps overly conscious fear of anything smacking even remotely of tyranny in government. Some of us are so sensitive about the subject that we frequently insist upon unnecessary and foolish precautions. The second one grows out of our somewhat questionable respect for law enforcement. Law enforcement officers have seldom been popular with us, and we have never been reluctant about placing obstacles in their way. The self-incrimination protection is a contrivance designed for this very end. The third arises from our general attitude toward court trials. These we consider, as we do elections, to be in the nature of sporting events, where two contestants are striving for victory. We regard the defendant as being the weaker competitor and therefore in need of a handicap. The self-incrimination immunity supplies this advantage, in part at least.

There is no more valid reason for excusing a suspect from testifying before a grand jury than there is before a trial court, provided, of course, that his rights to fair and just treatment are preserved. If he is subpoenaed before such a body, he should have the right to counsel, and, at his option, even have a magistrate preside. Moreover, the questioning ought to be limited to a particular matter, and not be allowed to reach out and embrace a variety of subjects. If an indictment is later found, the suspect would still have an opportunity to explain to the trial court his testimony before the grand jury and also to confront his accusers. In those states where prosecutions proceed from the district attorney's information, that officer should have the authority to examine the suspected one, but only under the supervision of a magistrate. The accused here also is entitled to counsel. On some occasions, a person under suspicion voluntarily appears before a grand jury, in which event he not only loses the protection of the immunity but is denied the privilege of cross-examining those making the accusations.

Forcing a person to testify before a legislative committee without benefit of the immunity entails some problems which might not be encountered elsewhere. The most serious of these is the lack of a presiding judicial officer to see that the witness is given fair treatment. It is common knowledge that a committee too often assumes the role of a prosecutor rather than that of an objective fact-finding body. Another is the absence of those rules of evidence which in a court of law forces the questioning into a narrowly defined channel. These obstacles, however, do not appear to be insurmountable and no doubt could be overcome if proper legal safeguards were thrown around the witness and the scope of the committee's authority strictly limited by law. Here, as in the case of an investigation before a grand jury, the witness should be allowed counsel, and be interrogated only with respect to a single subject at a time. Whether he should be questioned in public or in private should be left for him to determine. He should, moreover, be advised in advance of the exact nature of the investigation, and be examined, of course, solely concerning matters within the competence of the legislature.

If it be granted, for the sake of argument, that the self-incrimination privilege ought to be retained, it should then be employed sparingly, and only in a limited number of situations. Its use should be the exception rather than the rule. It should never be permitted in cases where the witness runs only a remote or slight risk of being linked to a crime, anything Dean Erwin N. Griswold of the Harvard Law School may say to the contrary notwithstanding. In his recent little book entitled *The Fifth Amendment Today*[17] the Dean has constructed some hypothetical situations which, if taken very seriously, would make the privilege available virtually to everyone and under almost any set of circumstances.

Dean Griswold offers the illustration of a person who was once a

16. *Declaration of the Causes and Necessity of Taking up Arms,* July 6, 1775, JOURNAL OF THE CONTINENTAL CONGRESS, ed. by W. C. Ford, Vol. II, pages 14 *ff.* The italics in the text are the writer's.

17. Erwin N. Griswold, THE FIFTH AMENDMENT TODAY, Harvard University Press.

member of the Communist Party, when it was no crime to be a Communist, and who, when later called upon to testify regarding his membership, invokes the privilege. The Dean believes that this person would be entirely within his rights to refuse to speak, because, though he could not be convicted of membership in the Communist Party alone, he might be convicted of it "plus something else".[18] Just what this "something else" might be the learned Dean does not disclose. As Dr. Griswold puts it, if the accused supplies proof of his membership in the party, "he does not know what other evidence may then be brought against him to show that he has committed a crime."[19] The answer to the Dean's claim is that scarcely a person who ever takes the witness stand knows with certainty when, by some peculiar and unexpected turn of events, his testimony may later connect him with an offense, even though it be nothing more serious than driving through a red light or expectorating on the sidewalk. Yet such a vague and remote contingency would never justify an individual to refuse to testify; if it did, every witness would fall back on the privilege as a precautionary measure.

The Dean assumes also a situation wherein a man who has never been a Communist, yet has contributed to certain so-called front organizations, which some people might construe as having communistic attributes, invokes the immunity. The Dean would permit the individual in such a case to refuse to answer even a truthful "No" to the inquiry whether he had ever been a Communist, out of fear that he might cause himself to be convicted of perjury. The Harvard savant is afraid that if, in the course of the testimony, it should develop that the accused or witness has contributed to these front organizations, such information *"might*[20] lead the jury to believe that he was actually a Communist",[21] and hence not telling the truth. In other words, because there is a distant possibility that a jury might conceivably not believe a man when he is actually telling the truth, Dean Griswold would permit him to take refuge in the self-incrimination provision.

Let us now concoct some hypothetical cases of our own which are quite as logical as those of Dean Griswold, which should point up the danger of attempting to give the immunity a strained construction such as its authors never intended to accord it. John Jones, on a rainy night, is cutting crosstown on foot in the city of *X*, and finds himself on Green Street, the locale of most of the community's houses of prostitution. Overtaken by a sudden downpour, he seeks refuge in the doorway of No. 221 Green Street, which happens to be the entrance of the best known of the brothels. He no sooner steps into the doorway than a gangster shoots and kills a policeman before his very eyes. Almost at once the police arrive on the scene, and discovering Jones in the doorway, secure his name. At the trial of the gangster, Jones is called as a witness, and the first question put to him concerns his whereabouts on the night of the shooting. Jones refuses to answer on the ground that he might incriminate himself by so doing. He reasons this way: If he states that he was in the city of *X*, the next question will be, "Where in the city of *X*?" If he were to reply, "On Green Street", the following question will be, "Where on Green Street?" If he were to say, "At 221 Green Street", he might be arrested later for frequenting a house of ill-repute, and then be unable to convince a jury that he was merely taking shelter from the rain. It is submitted, should this witness be allowed to invoke the self-incrimination immunity under such conditions, and thus perhaps frustrate the conviction of an obvious killer?

Or, take this case. City *X* is being flooded with counterfeit ten dollar bills. White, a grocer, sues Black for a forty dollar grocery account. Black defends by asserting that he paid Brown, White's clerk, with a fifty dollar bill receiving a ten dollar note in change. When called to testify regarding the transaction, Brown invokes the self-incrimination privilege. He does so because he is afraid that if he admits that he gave Black a ten dollar note, that particular note might later turn out to be one of the counterfeits. If he were then asked where he obtained the bill, he might not be able to satisfy the police and subsequently a jury that he had taken it from the till to make the change. Conceivably, he might find himself in state's prison for passing spurious currency.

Take another situation where the danger of prosecution is real and immediate. Adams, who is driving on the wrong side of the street, crashes into Monroe's automobile. Jefferson, who sees the occurrence, tells Monroe that Adams was to blame for the accident, and that he, Jefferson, would so testify. Adams thereupon protests that Jefferson is not telling the truth, and warns him that if he gives such testimony, he will have him indicted for perjury. Jefferson is positive that he can defeat any such charge, but not wishing to go through the ordeal of defending himself when he is innocent, uses the self-incrimination safeguard. On the witness stand he refuses to answer any questions concerning the incident, With Jefferson the threat is not remote but imminent, yet if he is permitted to employ the immunity, the civil courts might as well close their doors. Henceforth it would behoove every litigant to issue veiled hints of perjury prosecution to his adversary's witnesses, and thus dissuade them from testifying.

Dean Griswold would not restrict the use of the guarantee by a person solely for his own security. He would allow him to employ it to aid his friends in certain cases. An individual could invoke it, for exam-

18. *Ibid.*, page 16.
19. *Ibid.*
20. Italics belong to the author of this article.
21. Griswold, *op. cit.*, page 18.

ple, if he fears that, because of something he would say on the witness stand, he might cause his friends to become accused unjustly of a crime,[22] be placed in a position where they could possibly lose their jobs,[23] or be subjected to the "ordeal"[24] through which he has had to pass to clear himself of a charge. This notion is certainly a novel one in our jurisprudence, for the immunity has always been held to be a personal privilege,[25] to be pleaded only by him who seeks its protection. Such factors as the embarrassment of one's friends or their guilt or innocence can never have any bearing on, or relation to, the invoking of this safeguard.

The Dean likewise would permit the exemption to be used by a timid person who is fearful that he might become unnerved and frightened on the witness stand, and give testimony which inadvertently would connect him with a crime of some sort. "A witness", declares Griswold, "lost in fear and confusion might turn to the privilege as a means of sanctuary from a situation which he feels incompetent to handle."[26] Now, it is common knowledge that very few people feel comfortable in the witness chair, and most of them wish that they were somewhere else. Many of them are "scared to death" that under pressure they will contradict themselves, and thus become exposed to possible perjury charges. But if every witness so disturbed were allowed to call the immunity to his aid, litigation would soon come to a halt for want of testifiers.

Although the self-incrimination immunity is no longer the requisite of justice it was once, it should not now be relegated summarily into the discard. It should not be so treated because it is still capable of serving useful purposes within proper limitations. But if it is to be retained, it should be divested of its ability to continue as a refuge for the guilty regardless of whom they may be, and should be allowed to remain only as an asylum for those who are so immature, ignorant, mentally dull or similarly handicapped that they cannot protect their own interests. The employment of the exemption in this manner would, of course, necessitate relieving it of the constitutional straight-jacket into which it has been encased these many years, and giving it a more flexible, statutory status. This, in turn, would mean that control over the privilege would become lodged in the legislature, which could provide the required elasticity.

The notion of entrusting this privilege to the tender mercies of the legislature will no doubt cause dismay in some quarters. And it goes without saying that there was a time when such action would have been hazardous and fraught with evil. This was true in those periods when government was in the hands of a few voters, who frequently used it to their own advantage, even going to the extent of corrupting the courts to achieve their ends. There was much danger then that captive judges and jurors might become tools of a small designing group, and employ the self-incrimination and comparable devices to further its interests. But today, when nearly all adults possess the vote and therefore can oust their public servants almost at will, such a possibility is extremely remote.

It is contended, however, that universal suffrage is no guarantor of justice. Such a system does not assure that our court procedures will not become engines of oppression. The masses, it is urged, can be as tyrannical as a king; they can become that beast of which Alexander Hamilton once spoke. But the idea that the dominant group today operating under the democratic process would ever use, through its control of the legislature, the self-incrimination or any similar contrivance to suppress the minority seems completely unreal and out of character. To most people this fear is incomprehensible in the present day and age, and lives solely in the realm of fantasy.

If the immunity is confided to the lawmakers, and it becomes manifest that its retention in whole or in part is necessary to protect the individual from abuse by officialdom, the people will demand its maintenance with the full force of a constitutional guarantee. On the other hand, if it becomes evident that its elimination will expedite the arrest and conviction of criminals without causing substantial injustice to the innocent, they will insist upon its abandonment. The scope and the breadth of the application of the immunity can be left to the good sense and judgment of the voters speaking through their duly chosen representatives.

Those people who are alarmed that, without the self-incrimination immunity, we would soon slip down into the dark abyss of tyranny, should heed the sage counsel of one of the wisest jurists of our generation. Not so long ago, Justice Benjamin N. Cardozo, in discussing our procedural rights, wrote: "Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them [jury trial and indictment]. What is true of jury trials and indictments is also true, as the cases show, of the immunity from compulsory self-incrimination. This too might be lost, and justice still be done. Indeed today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. Justice, however, would not perish if the accused were subject to the duty to respond to orderly inquiry."[27]

The above excerpt is taken from an opinion of the United States Supreme Court upholding the power of a state to try an accused twice for the same crime. The people,

22. *Ibid.*, pages 16, 25.
23. *Ibid.*, page 25.
24. *Ibid.*, page 16.
25. *McAlister* v. *Henkel*, 201 U.S. 90; *United States* v. *White*, 322 U.S. 649.
26. *Griswold, op. cit.*, page 23.
27. *Palko* v. *Connecticut*, 302 U.S. 319.

who at that time had the same mawkish reverence for the protection against double jeopardy as others now possess for the self-incrimination exemption, threw up their hands in despair at this pronouncement of the high tribunal, and foresaw the doom of all freedom in this land. But fortunately, none of their dire predictions has been fulfilled; moreover, the commonwealths which permit double jeopardy in one form or another continue to thrive and prosper. Few of their inhabitants have felt so insecure in their liberties that they have moved to other jurisdictions; nor have migrants from sister states avoided these on this account. A similar situation obtains in the states allowing self-incrimination. They likewise are not shunned by other peoples, and their citizens appear reasonably happy and content. They are still regarded as sanctuaries of liberty and places where even-handed justice dwells.

Law-Science Short Course

▪ The Law-Science Institute sponsored by the Schools of Law and Medicine of the University of Texas will hold a course on Legal Medicine and elements of medico-legal litigation at the Hotel Morrison, Chicago, from July 16 to July 21. The director will be Dr. Hubert Winston Smith.

The course will consist of sixty hours of systematic instruction by a staff of medical specialists and trial lawyers featuring: structure and function of the body, orthopedic injuries, hand injuries, whiplash injuries, back injuries, surgical injuries, head injuries, intervertebral disc, psychic injuries, cancer, demonstrative evidence, compromise negotiation and settlement, and medico-legal trial technique.

The entire course is $100 and a single day is $20. Address all inquiries and send registration checks to The Law-Science Institute, The School of Law, University of Texas, Austin 12, Texas. Fees will be refunded if emergency prevents attendance. Make hotel reservations directly with Hotel Morrison, Clark at Madison Street, Chicago, asking for special rates available to Short Course registrants.

ASSOCIATION CALENDAR

REGIONAL MEETINGS

BALTIMORE, MARYLAND — October 10-13, 1956

States Included

(Mid-Atlantic Regional Meeting) —Pennsylvania, Delaware, Maryland, West Virginia, Virginia, North Carolina and the District of Columbia. (*Chairman to be announced later*)

BOARD OF GOVERNORS AND SECTION CHAIRMEN MEETING

CHICAGO, ILLINOIS — October 26-28, 1956

ANNUAL MEETINGS

DALLAS, TEXAS	August 27-31, 1956
NEW YORK AND LONDON	New York, New York July 14-16, 1957
	London, England July 24-30, 1957
LOS ANGELES, CALIFORNIA	August 25-29, 1958
WASHINGTON, D. C.	August 24-28, 1959

(Continued from page 624)

Agreement Reached . . . *A Marriage Saved*

The husband and wife were then seen together by the counselor and a reconciliation agreement was worked out by them. The counselor reviewed with them the typical agreement, which they had already read, certain pages were removed, which were inapplicable, and others were suggested by the counselor and added to the agreement to cover the particular problems of the family. Copies of the agreement were rapidly assembled by the clerk for the parties and their counsel. The original was duly executed and again it was approved by the judge and a court order made which was served upon each of the parties before they left. As husband and wife left the counselor's office hand in hand, the counselor had the warmth of good feeling with which God rewards those whose lives are devoted to the helping of others.

This family was one of 887 families reconciled in the Conciliation Court of Los Angeles County during the years 1954-1955. Two thousand seventy-four couples with divorce proceedings either threatening or actually filed appeared before the Conciliation Court during the same period and reconciliations were effected in 43 per cent of these cases. The court makes a check one year after a family has been reconciled to determine whether the reconciliation is still in effect, and a tabulation of the returns indicates that in three out of four instances the reconciliation has remained in effect.

One month after a reconciliation has been effected, the parties receive a letter from the judge of the court congratulating them. In addition, the letter advises them that if for any reason they find that they are unable to live together under their agreement they should not violate its provisions and the court order, but should request a further hearing. At such hearing, if it appears that the reconciliation has failed, the parties are relieved of their agreement and the court order is terminated.

The counseling work in the Conciliation Court is carried on by three counselors, one with nine years' experience with the court, one with four, and another who has a master's degree in social work and ten years' experience in family counseling before coming to the court.

The cases which come before the court fall into two major categories, one where the difficulties involved have come from "without" the family, the other where they have come from "within". In the first class a family is assailed by emergencies of one kind or another such as strenuous financial difficulties, sickness, outside interference by other persons, or similar difficulties which have not necessarily destroyed the basic love of the parties one for the other. These difficulties are very often met through the conciliation process and without the necessity of continuing counseling.

In the second category of cases, however, the difficulties are more deep-seated such as in cases where alcoholism, insecurity, emotional instability, gross immaturity, mental illness, etc., are present and in such instances further counseling for either one or both of the parties is a necessity if the family is to succeed. Obviously the court is not in position to render such service. Quite often it may require psychiatric or psychological assistance or child guidance training. As a result, we have developed in this county a program of close co-operation between the court and the family service agencies of the community. When such a case is encountered, the counselor reviews with the parties a list of community sponsored family service agencies. If the parties are of a particular religious faith, they are referred to the agency of that faith.

When the parties have selected the agency they desire to contact, then the counselor alerts the agency by a letter and the agency follows it up by inviting the parties to come in or telephone for an appointment. The court referrals are treated as emergency cases by the agency and they are advanced ahead of waiting lists. The agency is in a much better position than is the court to route an individual who requires psychiatric aid or other attention to the proper private or public sources.

We consider that the utilization of a reconciliation agreement, which is readily compiled and signed at the very moment of reconciliation, lends dignity and weight to the promises made. It also serves the purpose of educating and in some cases re-educating people as to the basic responsibilities of marital partners to one another. Experience has taught us that it serves as a "working" document to be referred to time and time again by families when troubles subsequently arise. *Time* (January 2, 1956) aptly called it our "basic weapon". It serves as a channel of communication for those who appear unable to "reach" one another. In it we have compiled the best thinking we have been able to secure and to all who have helped we are very grateful.

We have utilized the contempt powers of the court very sparingly. In two years only twenty violators were cited into court on affidavits alleging wilful violations of the agreements and, of these twenty, ten went to jail. However the fact that

even one went to jail has been helpful in having the parties understand that their agreement and the court order thereon are serious matters.

It is interesting to note that over 2000 children were involved in the families where reconciliations were effected. Recognizing the stake that the state has in preserving the family unit, the law provides that no filing fees or other official charges are to be made for services performed by public officers in the work of the Conciliation Court.

Family counseling at the court level is work which demands a tremendous amount of patience, self-restraint, ability to listen, and natural sympathy for the problems and welfare of others. In this connection, our court has been exceedingly fortunate in the degree of devotion and ability of its staff. In my limited experience, I have found that it takes a heavy toll on the nervous system of the official who conducts such conferences all day long. On the other hand, there is little to equal the satisfaction one feels when one is successful in aiding a deserving couple to surmount misunderstandings, forgive transgressions, and go back together determined to look to the future with love, hope and trust. What a grand feeling it is to aid in restoring to the security of a home and to the love of both parents the bewildered and helpless children of such a home.

A goal for the many devoted people engaged in marital counseling might well be expressed in the twelfth century, but still beautiful, words of St. Francis of Assisi—"Lord, make me an instrument of your peace; where there is hatred, let me sow love; where there is injury, pardon; where there is doubt, faith; where there is despair, hope; where there is darkness, light; and where there is sadness, joy."

The Reed-Dirksen Amendment

(*Continued from page 620*)

flat rate of income tax, with present deductions and exemptions, itself results in a progressive scale of *effective* tax rates ranging from 2 per cent for a family of four with a $3000 income to 16 per cent at $25,000, as shown in the table below.

Certainly the experience of England furnishes no hope that the needed changes in our tax laws can be effected by legislation, where, as in the United States, a similar system of taxation has existed for many years, with the result that Socialism has to a substantial degree supplanted private enterprise.

Fortunately, we have in this country something which England does not have—a written Constitution.

The Constitution is filled with curbs on the power of Congress, which were placed there to protect the people's rights, such, for example, as freedom of religion, freedom of speech, freedom from unreasonable searches and seizures and freedom from being deprived of life, liberty or property without due process of law. Excessive taxation would ultimately render many of these rights of little value. For example, what benefit would a citizen derive from the constitutional guarantee that he is not to be deprived of his property without due process of law if his property is taken from him or rendered of little value to him by excessive taxation? The freedom of the individual, which is the highest prize of all, is not safe without a curb on the taxing power. Congress should no more have unlimited power over one's property than over his person; for, in the oft-quoted language of Chief Justice Marshall, "The power to tax involves the power to destroy."

It is worthy of note that the constitutions of nineteen states contain curbs on the taxing power of their legislatures, and that in four of these states the curb relates to taxes on income.

Even if it should be possible to get a Congress to adopt the needed changes in our taxing system, there can be no assurance without a constitutional amendment that the changes would be permanent. A later Congress could overnight eliminate the changes.

The following statement by Thomas Jefferson is just as true today as when he uttered it:

> In questions of power, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution.

Question 3

If it is concluded that our present system of taxing incomes, inheritances and gifts should be changed, and that this should be done by amending the Constitution, is the proposed amendment the right sort of amendment?

Mr. Meyer answers this question by stating that "The *method* represented by the proposed amendment seems illogical, unsound and impractical."

With this I disagree.

At the outset, let me correct certain erroneous impressions or inferences regarding the aims and purposes of the proposed amendment and its proponents.

(1) The purpose is not to *compel* a shift from the income tax to a sales tax.

This inference is based upon statements of proponents of the amendment pointing out the fact that any possible immediate loss in revenue would be of minor amount and *could*

A Family of Four			
Before Exemptions and Deductions	Taxable Income After Exemptions and 10% in Deductions	Tax at 20%	Percent of Tax to Income Before Exemptions
$ 3,000	$ 300	$ 60	2.0
5,000	2,100	420	8.4
10,000	6,600	1,320	13.2
25,000	20,100	4,020	16.1

be made up by excise or sales taxes, which under the present law produce only 15 per cent of the total federal revenue as compared with 78 per cent from income taxes. At the same time, however, the proponents expressed the opinion that the loss in revenue would be only temporary and that eventually the lower rates on income would produce greater revenue than the higher rates.

The revenue from an income tax is dependent not only on the rate of the tax, but also on the size of the income on which the tax is imposed. Within reasonable limits, lower rates will in due course produce greater revenue than higher rates.

There are two reasons:

(1) The lower rates leave more income in the hands of the taxpayers. This income when invested produces more income, which in turn, when invested, produces still more income, and so on.

(2) The lower rates *encourage* greater work, greater savings and greater production of wealth.

The result is to increase the national income on which the tax is imposed, so that with lower tax rates greater revenue will be produced. This in turn makes possible further reductions in rates. At the same time, the increase in the nation's wealth benefits the people as a whole.

Accordingly any immediate loss in revenue through the elimination of the higher rates would undoubtedly be only temporary. Eventually the lower rates would produce greater revenue than the higher rates.

This view is supported by the actual experience of the Federal Government.

The principle involved is the same as that governing the operation of a successful business, namely, that within certain limits the greatest profits come from charging a low rather than a high price for goods sold. As high prices lessen the ability and incentive to buy, so high tax rates lessen the ability and incentive to work, save and invest.

The *immediate* loss in revenue from the individual income tax and the estate and gift taxes occasioned by the adoption of the amendment would amount to only about $3 billion. The case of the corporation tax is dealt with further on.

Eliminate Waste . . . *Competition with Business*

The proponents of the amendment also pointed out that by eliminating waste and extravagance the federal budget *could* undoubtedly be cut by an amount substantially in excess of any immediate loss of revenue occasioned by the proposed amendment. The reports of the Hoover Commission on Organization of the Executive Branch of the Government show how at least $7,500,000,000 could be saved each year through the elimination of waste, without involving any reduction in military strength, any item of useful public works, or any "delivered" federal contribution to health, education and welfare.

Furthermore, the Federal Government is heavily engaged in a great many industries competing with private enterprise. A report of a subcommittee of the House on government operations in 1954 presents a staggering array of government businesses that feed on the tax monies collected from their business competitors. These businesses cover almost all phases of American enterprise—manufacturing, transportation, services, insurance, credit, retailing, etc.

The Federal Government owns land equal to one fourth of the area of the forty-eight states.

The National Associated Businessmen, Inc., an organization headed by Charles E. Wilson, a former president of General Electric Company, in a statement issued last year had this to say on this subject:

> Secretary of Agriculture Ezra Taft Benson, speaking recently in New York, said that two years ago the Federal Government "owned or had a stake in *$130,000,000,000* worth of railroads, ships, coffee-roasting plants, sawmills, paint factories, bakeries and refineries". He added: "We are at last moving steadily in the opposite direction—and none too soon."

In another statement issued by this same organization last year, it is said:

> The sale of these business enterprises to tax-paying businesses would benefit all segments of our economy.
>
> *First,* and foremost it would reverse the present trend to Socialism which is placing more and more of our economy in public ownership.
>
> *Second,* it would enable the Federal Government to reduce the national debt by up to 10 per cent [about $30 billion] and thereby cut Federal expenditures for interest by as much as $600 million a year.
>
> *Third,* it would spread the tax base by placing more business in the hands of taxpayers. It is estimated that this would increase tax revenues by $1 billion a year.
>
> *Fourth,* it would eliminate further appropriations from the U. S. Treasury for annual operating costs and expansion of these institutions. This could amount to as much as three billion dollars annually.
>
> *Fifth,* it would make a substantial reduction in Federal taxes possible by decreasing expenditures and increasing revenues. The possible reductions would be up to $4.6 billion annually. Other savings in the Defense Department would result from the release of civilian and army personnel.
>
> *Sixth,* it would restore tax revenues to local governments where these enterprises have all but wiped out large segments of taxable property.

The American Progress Foundation, of Los Angeles, California, estimates that more than $50,000,000,-

000 is recoverable by selling the properties and facilities of the federal corporations back to the American people, and that the annual savings in cost of government would amount to many billions.

May I also point out that the Report of the Special Committee on the Income Tax Amendment, which Mr. Meyer cites in this connection, dealt with the first Reed-Dirksen Amendment, which was much more rigid than the present or second Reed-Dirksen Amendment, in that it limited Congress to a 40 per cent maximum rate in peace time even with a three-fourths vote.

I do not wish to imply, however, by anything I have said, that I consider the relatively small portion of the tax load carried by excise taxes a sound policy. Taxes on expenditures, *i.e.*, excise or sales taxes, constitute a much more dependable source of revenue than taxes on income, for income fluctuates with the rise and decline of business in a much greater degree than spending.

Writing on this subject in September, 1953, William R. Biggs, Vice President of the Bank of New York, the oldest banking institution in the country, said:

> No government in the world, to our knowledge, raises such a large proportion of its budget from income taxes (personal and corporate) as the United States. In most countries, including members of the British Commonwealth, the percentage of the budget raised from income taxes (personal and corporate) is nearer 50% than the 80% in the United States. Because of this dependence on income taxes, revenues are especially difficult to predict. . . . If the long term integrity of the dollar is to be maintained, the present top-heavy dependence for revenue on income taxes must be adjusted.

(2) Another erroneous inference on Mr. Meyer's part is that the proposed amendment "seeks to control government spending by the left-handed method of limiting a particular source of revenue".

The proposed amendment has nothing whatever to do with spending. This matter is the subject of another amendment, known as the Byrd-Bridges Amendment (S.J.Res. 126), introduced in the Senate by Senators Byrd and Bridges on January 25, 1956, which is aimed at compelling the balancing of the federal budget each year.

Except for the comparatively trivial amount raised by the federal estate and gift taxes (less than $1,000,000,000 a year), the proposed amendment does not impair the Government's power to raise needed revenue during either war or peace. It merely limits the degree of income tax rate progression, which is wholly without justification anyway. It does not prescribe the top rate that Congress may impose.

Mr. Meyer states that, "An inescapable fact is that the proposed limitation would greatly reduce federal revenues from the income tax. In fact, that is its major purpose."

This is not the fact. The Federal Government's power to raise revenue from the income tax would in no way be impaired. Mr. Meyer's assertion is apparently based upon his assumption that the necessity of obtaining an affirmative vote of three fourths of all the members of each House in order to exceed the 25 per cent rate would make that the top rate in "all but the most unusual and extreme circumstances".

I do not for a moment agree that any such limitation would be applied under present conditions, for example, or other emergency conditions. Balancing the budget is of primary importance.

As I have above pointed out, a reduction in the higher bracket rates of the individual income tax would involve a comparatively small loss in revenue—a loss which would undoubtedly soon be made up by an increase in the income base on which the tax is levied. Both reason and our own past experience justify this conclusion.

A drastic cut in the corporate rates would be more costly, and it would take a longer time to repair the loss. For example, a cut of 7 per cent in the top rate, so as to reduce it to 45 per cent, just 15 percentage points above the beginning rate of 30 per cent, would cost about $3 billion in revenue.

The fact that in the case of corporations the spread of 15 percentage points between the top and bottom rates permitted by the Reed-Dirksen Amendment is less than the existing spread of 22 percentage points, constitutes no valid objection to the amendment, and, *if the budget needs do not warrant it*, should not require the lowering of the top rate merely to meet a desired or previously established level for the bottom rate. Instead, the bottom rate could be increased. Certainly as between a substantial reduction in individual income tax rates and a few points reduction in corporate rates, it would seem clear

that the *stockholders* of the small corporations, who are the real parties in interest, would prefer the former. As I have already pointed out, however, the available economies in the budget should render this question academic.

According to former Secretary of the Treasury Snyder's report of February 5, 1951, to the Ways and Means Committee, there were 400,000 corporations paying taxes, 280,000 of which had profits of $25,000 and less. These small corporations had only 4.8 per cent of the taxable net income of all corporations, and paid only 3 per cent of the total taxes on corporations.

Graduated Rates . . . *Unsound for Corporations*

Irrespective of one's views as to graduated rates in the case of individuals, it must be clear that the graduation of rates in the case of corporations is unsound. In essence, a corporation is nothing but the aggregate of its stockholders. It is the stockholders, not the corporation, to whom the profits ultimately belong and upon whom the tax burden in reality falls. The value of the average stockholding is undoubtedly much less in the case of the large corporations than in most of the smaller ones. Accordingly, to tax the large corporation at a higher rate than the small is in effect to tax the small stockholder, the real party in interest, at a higher rate than the large stockholder.

It should be remembered that the stockholders of the corporations in the "$25,000 and under" class constitute only a small fraction of the total number. However, largely for political reasons, there has become imbedded in our tax laws the principle of granting lower rates to the small corporations. All that the proposed amendment does is to provide that this concession shall not exceed 15 percentage points.

It should also be borne in mind that the proposed amendment does not require the rates on corporations and individuals at any time to be the same.

(3) Mr. Meyer suggests that "to reduce the maximum progression at one fell swoop from 71 per cent to 15 per cent or less might have drastic and far reaching consequences upon taxpayer morale".

It is, of course, not necessary to have this reduction "at one fell swoop". It will undoubtedly take some years after the amendment is approved by Congress to secure its ratification by three fourths of the states. During that time, Congress could gradually reduce the rates.

May I say that I am in complete accord with Mr. Meyer's view that, in place of the many special relief provisions in the present law which are of help principally to special groups, attention should be concentrated on reducing the excessively high and confiscatory rates—the outstanding vice in the law today.

Summary

By way of summary, therefore, I submit that

(1) The heavy progressive rates of our present income, death and gift taxes will eventually lead to Government ownership and control of all industry, which is socialism.

(2) The proposed amendment would largely eliminate the socialistic features of our tax system without impairing the Government's power to raise revenue, except by means of death and gift taxes. The revenue from these two sources has been running at less than $1,000,000,000 a year.

(3) The initial loss from any changes in taxes required by the amendment would be substantially less than the savings recommended by the Hoover Commission.

(4) Moreover, such initial loss would soon be made up by the increase in revenue resulting from the lower rates.

(5) Our present system of taxation is dangerously lopsided in its extreme dependence on income taxes. A much larger proportion of our revenue should be raised by consumption taxes. This of itself would permit a substantial reduction in all income tax rates.

(6) The issue is whether, with these facts before us, we should hesitate to eliminate the socialistic features of our present tax system and to insure the permanence of such changes by a constitutional amendment.

In conclusion, therefore, I submit

(1) That the present system of taxing incomes, inheritances and gifts should be changed;

(2) That no enduring change can be effected without a constitutional amendment; and

(3) That the proposed Reed-Dirksen Amendment is a sound and practical means of effecting the needed changes.

Classified

RATES 20 *cents per word for each insertion: minimum charge of* $2.00 **payable in advance.** *Copy should reach us by the first day of the month preceding month of issue. Allow two extra words for box number. Address all replies to blind ads in care of* AMERICAN BAR ASSOCIATION JOURNAL, *1155 East 60th Street, Chicago 37, Illinois.*

BOOKS

LAW LIBRARIES OR LESSER COLLECtions of esteemed used law books purchased. Our 64-page printed catalog free on request lists some used law books we have for sale, also indicates the type of materials we will purchase. CLAITOR'S BOOK STORE, Baton Rouge 2, Louisiana.

LAW BOOKS—WE CAN SUPPLY THE FOLlowing sets at this time: U. S. Attorney General opinions, complete sets and odd volumes—Decisions of the Commissioner of Patents, complete sets or odd volumes—U. S. Supreme Court Reports complete, Law Edition.—U. S. Supreme Court Reports, Official Single Volume edition complete. —Supreme Court Reporter, complete. ALSO, the following complete Law Reviews: Notre Dame Lawyer, Marquette Law Review, Yale Law Journal, Harvard Law Review. Write us for your every law book need—DENNIS & Co., INC., 251 Main St., Buffalo 3, New York.

UNITED STATES GOVERNMENT PUBLIcations at regular Government prices. No deposit—Immediate Service—Write NATIONAL LAW BOOK COMPANY, 1110—13th St. N. W., Washington, D. C.

LAW BOOKS USED AND NEW—BOUGHT, sold, traded. Reporter System Units, American Law Reports, American Jurisprudence. Corpus Juris Secundum. U. S. C. A., Digests, all text books, etc. Appraisals free. R. V. BOYLE, LAW BOOKS, Leonhardt Building, Oklahoma City 2, Oklahoma.

LAW BOOKS BOUGHT AND SOLD: COMplete libraries and single sets. CLARK BOARDMAN CO., LTD., 11 Park Place, New York City.

"THE HAND OF HAUPTMANN," STORY of Lindbergh Case by Document Expert cited by John Henry Wigmore, 368 Pages, 250 Illustrations. Price $5.00. J. V. HARING & J. H. HARING, 15 Park Row, New York 38, N. Y.

FOR A PROMPT CASH OFFER ON LAW books, write The Michie Company, Charlottesville, Virginia.

WAGE HOUR LAW—WECHT—$15.00—PORtal to portal says Supreme Court—One dollar minimum says Congress—Order from Mitchell, 1301 S. 58, Phila. 43.

LAW BOOKS BOUGHT, SOLD, EXchanged. Free Catalogue, IRVING KOTHS, 516½ Main St., Vancouver, Washington.

WHEN YOU HAVE A DOCUMENT PROBlem of any kind send for "Questioned Documents, Second Edition," 736 pages, 340 illustrations, $12.50 delivered. ALBERT S. OSBORN, 233 Broadway, New York 7, N.Y.

LAW BOOKS BOUGHT AND SOLD: COMplete libraries and single sets. CECIL SKIPWITH, 306 West 1st Street, Los Angeles 12, California.

WRITE US FOR YOUR TEXT BOOK needs. Good used law books bought, sold and exchanged. (In business 47 years.) THE HARRISON COMPANY, 93 Hunter Street, S. W., Atlanta 2, Georgia.

LOWEST PRICES USED LAW BOOKS—complete stocks on hand, sets and texts—LAW Libraries appraised and bought. NATIONAL LAW LIBRARY APPRAISAL ASSOCIATION, 538 South Dearborn St., Chicago 5, Illinois.

THOMAS LAW BOOK COMPANY PUBLISHers. We Sell, Buy and Exchange. Incorporated 1885. St. Louis 2, Mo.

USED LAW BOOKS AT ATTRACTIVE prices. We buy and sell either one book or a complete library. Let us quote you prices. HARRY B. LAKE, 321 Kearney Street, San Francisco 8, California.

BOOKCASES

USED, GOOD CONDITION, GLASS-DOOR types with rounded edges per case, top, base each $5.00. When ordering specify make, color, serial number, check with order, f.o.b. LAWYERS SERVICE CO., 500 N. 19th St., St. Louis, Mo.

HANDWRITING EXPERTS

CHARLES C. SCOTT, KANSAS CITY, MO. Author: *Photographic Evidence.* Handwriting and typewriting identified. Forgeries and alterations detected. Faded and obliterated writing deciphered. Nationwide experienced consultant and expert witness. Commerce Trust Building. VIctor 2-8540.

LUKE S. MAY, CONSULTING EXPERT & examiner of "Questioned Documents." Qualified all courts United States and Canada. Advanced Scientific Evidence Laboratories for proof of facts, all types disputed papers. Phone Elliott 2445, 843 White-Henry-Stuart Building, Seattle 1, Washington.

M. A. NERNBERG, EXAMINER OF DISputed Documents. Thirty years' experience. Formerly specially employed by the United States Government as handwriting expert in cases involving handwriting. 1728 Grant Building, Pittsburgh, Pa. Phone ATlantic 1-1911.

LINTON GODOWN, MEMPHIS, EXAMINER handwriting, signatures, typewriting, inks, alterations, etc. Portable laboratory equipment. Reports. Exhibits. Experienced, qualified witness. Member ASQDE. Manhattan Bank Bldg., Jackson 6-4321.

DR WILMER SOUDER, CONSULTANT. REPORTS, EXHIBITS, TESTIMONY. 30 years' experience in State and Federal Courts. 3503 Morrison St., N. W., Washington 15, D. C. Phone: WOodley 6-3050.

KARL SCHOTTLER, 915 CHESTNUT Street, St. Louis 1, Mo., Telephone GArfield 1-3399, Document Examiner and Handwriting Expert; Modern Laboratory; Scientific Technique in Document Examinations.

GEORGE G. SWETT, ST. LOUIS, MISsouri, 14 South Central (5) Telephone: PArkview 5-9394. Handwriting, typewriting and document expert U. S. Post Office Department 12 years. All types of document problems considered. Photographic laboratory maintained. Centrally located on major air and rail lines. Member American Society of Questioned Document Examiners.

E. H. FEARON, BESSEMER BUILDING, Pittsburgh 22, Pa. Enlarged photographs made in black and white also in color in THIRD DIMENSION to show erasures and alterations. Special test plates made to show differences or similarities in TYPEWRITING and HANDWRITING. Restoration of erased writing and differences in WHITE PAPERS shown by use of ultra violet and infrared light. Measurements and tests to demonstrate photographically differences or similarities in use of PENS and INKS. Nationwide experience in preparing photographic exhibits for court use. Office telephone: ATlantic 1-2732; residence telephone: COlonial 3-7865.

HERBERT J. WALTER, EXAMINER AND photographer of Questioned Documents. 40 years' experience. Charter member ASQDE. George B. Walter, Associate. Phone: CEntral 6-5186. 100 North La Salle Street, Chicago 2.

VERNON FAXON, EXAMINER OF QUESTioned documents. Opinions rendered re: Handwriting, typewriting, erasures, interlineations, substitutions on wills, deeds, contracts, books of account, and all kinds of documents. Suite 1408, 134 North La Salle Street, Chicago 2, Ill. Telephone: CEntral 6-1050.

HARRY M. ASHTON, 3601 EDWARDS ROAD, Cincinnati 8, Ohio. Telephone East 1-6704, or Willow 1-3019. Over 30 years with Post Office Department. Qualified in all courts. Completely equipped laboratory for handling all types of document problems. Member American Academy of Forensic Sciences and International Association for Identification.

RICHARD C. HALL, HANDWRITING EXpert, examiner of Questioned Documents since 1930, presently with U.S. Government. Identification of handwriting; pen & pencil printing; anonymous letters; questioned typewriting; expert testimony. 8609 Meadowbrook Lane, Norfolk 3, Va. Phone JU 8-9488 after 4 P.M., all day Saturday and Sunday.

HARRIS & HARRIS, 510 SOUTH SPRING Street, Los Angeles, telephone MAdison 5-1518; and 690 Market Street, San Francisco, telephone DOuglas 2-4329. Discovery and proof of facts relating to disputed handwriting, typewriting, inks and papers. Over 25 years' experience. Qualified in all courts. Members: American Society of Questioned Document Examiners.

BEN GARCIA, EXAMINER OF QUESTioned handwriting, typewriting and inks. Qualified witness. Years of experience. 805 E. & C. Building, Denver, Colorado. Phone: AComa 2-1729.

Sharing Our System of Jurisprudence

■ Would you help a younger, less experienced member of your profession gain the knowledge he needs to become a credit to the profession, so that someday he might contribute something worth-while in return? Many of you already have and in addition have contributed to local, national and international organizations such as the Community Chest, the United Cerebral Palsy Association, the Bundles for Britain Organization, etc., all of which are seeking the betterment of the city, state, country and world.

Now there is an opportunity for you and your state and local bar associations to do a real service for your profession. Many Far Eastern countries, upon gaining political independence, have adopted constitutions based on ours. The judges and lawyers of these countries, a number of whom have been educated in American and British law schools, are looking to the decisions of the various courts throughout America for help in interpreting their basic law. What greater tribute could be paid to our system of jurisprudence and our legal profession?

Chief Justice Robert G. Simmons of the Nebraska Supreme Court has visited many of these Far Eastern countries—among them, Pakistan, Formosa, Japan, Thailand, Philippine Islands, Burma, Indonesia, India and Ceylon. He found an extreme need for books containing the reports of the decisions of our American courts. Upon returning, he founded the project entitled "Law Books for the Orient", and has requested the aid of all members of the legal profession in America who are willing and able to collect books for this project.

At present, the Ohio State Bar Association is the leading contributor, having collected and shipped over 2000 volumes of books from its membership. Also, among the top contributors are the Northwestern Kansas Bar Association and the Bar Association at Duluth, Minnesota.

As an individual, you can help by encouraging your state and local bar associations to form committees to aid in this effort. The books needed are standard texts, especially those titles in general treatises of the law and constitutional law. Ruling case law volumes are needed by the schools and Corpus Juris is particularly desired by the courts. Also, such texts as Wigmore and Pomeroy, reports such as United States Supreme Court Reports and the selected case service of A.L.R. and L.R.A., even though old editions, are quite acceptable.

The donors are asked to pay only the cost of packaging the volumes for overseas. The U. S. Information Agency provides transportation and delivery in the name of the donor. With that exception, this is a program of gifts of law books by American lawyers to lawyers in the courts of the free nations of the world. Here, in America, our law books speak by reason of authority. Overseas, our law books speak by authority of reason. Let's give our fellow lawyers of the world access to the tools of our profession.

Further information can be obtained by writing to Chief Justice Robert G. Simmons, Supreme Court, Lincoln, Nebraska.